Shamsudin bin Shaik Jamaludin v Kenwood Electronics Technologies (M) Sdn Bhd

HIGH COURT (JOHOR BAHRU) — SUIT NO 22-35 OF 1997
ABDUL MALIK ISHAK J
3 AUGUST 1998

Civil Procedure *— Injunction — Interlocutory mandatory injunction — Application for injunction compelling immediate return of company car from dismissed employee — Whether interlocutory mandatory injunction could be granted when its effect would be to provide defendant, at interlocutory stage, the final relief which court could only rightly grant after conclusion of trial — Whether exceptional case proved — Rules of the High Court 1980 O 29 r 1*

The plaintiff was employed as the divisional manager of the defendant's company. Under the contract of employment, the plaintiff was eligible to a company car ('the car'). The plaintiff was absent from his work without applying for leave. The defendant then informed the plaintiff that the plaintiff's continued absence from work constituted a fundamental breach of the contract of employment tantamount to an abandonment of his contract of employment. The defendant requested the plaintiff to return the car but the plaintiff failed to do so. The plaintiff commenced proceedings against the defendant seeking for an order that he be reinstated in his former employment and a declaration that he is entitled to the transfer of the car in his name based on the oral promise by the defendant that the car would be transferred to his name upon completion of two years of employment. The defendant filed a counterclaim, inter alia, for a mandatory order against the plaintiff to return the car to the defendant. The defendant then made an application under O 29 r 1 of the Rules of the High Court 1980 for a mandatory order compelling the plaintiff to immediately return the car to the defendant. The issue before the court was whether an interlocutory mandatory injunction could be granted when its effect would be to provide the defendant, at this interlocutory stage, the final relief which this court could only rightly grant after the conclusion of the trial. The defendant advanced two grounds to show that this was an exceptional and extremely rare case for the grant of an interlocutory mandatory injunction, namely: (i) the defendant was the registered owner of the car as shown in the logbook or the registration card or the registration certificate; and (ii) as the registered owner of the car, the defendant was invariably exposed to police summonses.

Held:

(1) Before an interlocutory mandatory orders are granted, the applicant must: (i) prove by affidavit evidence that his application is an exceptional and extremely rare case which merits the order prayed for; (ii) show that his case is clear and one which the court thinks ought to be decided in his favour; and (iii) show a clear case

for relief or a high degree of assurance that the injunction, if granted, would rightly be granted (see p 454A–C).

(2) The plaintiff had failed to substantiate his allegation that there was such an oral promise that the car would be transferred to his name upon completion of two years of employment. In fact, all the terms pertaining to the plaintiff's employment were embodied in the defendant's offer of employment (see p 458H).

(3) The car remains throughout a company car belonging to the defendant and the defendant remains till today as the registered owner on its logbook or registration card or the registration certificate in the prescribed form. The plaintiff merely used the car by virtue of his eligibility for its use under the defendant's offer of employment and that offer of employment did not give the plaintiff any right to have the car to be transferred to his name after completion of two years' employment with the defendant. When the plaintiff abandoned his contract of employment, the eligibility to the use of the car ended and the car must revert back to the defendant. The defendant at no time part with the logbook nor the ownership of the car (see p 469D–H).

(4) As an indicia of title, the logbook or the registration cars or the registration certificate in the prescribed form in the name of the defendant and in the possession of the defendant makes the defendant in a better position than that of the plaintiff. Prima facie the defendant is the legal owner and has a better title to the car than the plaintiff (see p 475C).

(5) This case is an exceptional and extremely rare case with a high degree of assurance that the injunction sought will be granted at the conclusion of the trial. This court has the power at its disposal to grant an interlocutory mandatory injunction notwithstanding the fact that it would give the defendant the whole remedy as prayed for in the counterclaim. Having considered all the circumstances of this case, particularly the necessity to give adequate protection and safeguards to both sides, the court ordered that the car should be kept at the premises of the High Court Johor Bahru (see p 476A–C).

[Bahasa Malaysia summary

Plaintif adalah digaji sebagai pengurus bahagian syarikat defendan. Di bawah kontrak pekerjaan plaintif adalah layak untuk kereta syarikat ('kereta tersebut'). Plaintif tidak hadir untuk kerja tanpa memohon untuk cuti. Defendan kemudian memberitahu plaintif bahawa ketidakhadiran secara berterusan plaintif daripada kerja merupakan kemungkiran asasi kontrak pekerjaan yang sama seperti tindakan meninggalkan kontrak pekerjaan beliau. Defendan meminta plaintif memulangkan kereta tersebut tetapi plaintif gagal berbuat demikian. Plaintif memulakan prosiding terhadap defendan memohon untuk

perintah bahawa beliau dikembalikan jawatan dalam pekerjaan dahulu beliau dan deklarasi bahawa beliau berhak kepada pemindahahan kereta tersebut kepada nama beliau berdasarkan janji lisan oleh defendan bahawa kereta tersebut akan dipindahkan kepada nama beliau apabila tamatnya dua tahun pekerjaan. Defendan memfailkan tuntutan balas, antara lain, untuk perintah mandatori terhadap plaintif untuk memulangkan kereta tersebut kepada defendan. Defendan kemudiannya membuat permohonan di bawah A 29 k 1 Kaedah-kaedah Mahkamah Tinggi 1980 untuk perintah mandatori memaksa plaintif untuk segera memulangkan kereta tersebut kepada defendan. Isu di hadapan mahkamah adalah sama ada injunksi mandatori interlokutori boleh diberikan apabila kesannya adalah memberikan kepada defendan, pada tahap interlokutori, relif muktamad yang mana mahkamah ini cuma boleh dengan betulnya memberikan-nya setelah tamatnya perbicaraan. Defendan mengemukakan dua alasan-alasan untuk menunjukkan bahawa ini adalah suatu kes luar biasa dan sangat jarang untuk memberikan injunksi mandatori interlokutori, iaitu: (i) defendan adalah pemunya berdaftar kereta tersebut seperti mana yang ditunjukkan di dalam buku log atau kad pendaftaran atau sijil pendaftaran; dan (ii) sebagai pemunya berdaftar kereta tersebut, defendan adalah sentiasa terdedah kepada saman-saman polis.

Diputuskan:

(1) Sebelum perintah-perintah mandatori interlokutori adalah diberikan pemohon mesti: (i) membuktikan melalui keterangan afidavit bahawa permohonan beliau adalah suatu kes luar biasa dan sangat jarang yang wajar mendapat perintah yang dipohon; (ii) menunjukkan bahawa kes beliau adalah jelas dan satu di mana mahkamah berpendapat adalah sewajarnya diputuskan untuk memihak kepada beliau; dan (iii) menunjukkan kes yang jelas untuk relif atau darjah jaminan yang tinggi bahawa injunksi tersebut, jika diberikan, adalah diberikan dengan betul (lihat ms 454A–C).

(2) Plaintif telah gagal untuk mengesahkan pengataan beliau bahawa terdapatnya janji lisan sedemikian bahawa kereta tersebut akan dipindahkan kepada nama beliau apabila tamatnya dua tahun pekerjaan. Sebenarnya semua terma-terma berkenaan dengan pekerjaan plaintif adalah terkandung di dalam tawaran pekerjaan defendan (lihat ms 458H).

(3) Kereta tersebut sepanjang masa tetap kereta syarikat kepunyaan defendan dan defendan tetap sehingga hari ini merupakan pemunya berdaftar pada buku log atau atau kad pendaftaran atau sijil pendaftaran di dalam borang yang ditetapkan. Plaintif cuma menggunakan kereta tersebut oleh kerana kelayakan beliau untuk menggunakannya di bawah tawaran pekerjaan oleh defendan dan tawaran pekerjaan tersebut tidak memberikan plaintif apa-apa hak untuk memindahkan kereta tersebut kepada nama beliau setelah tamatnya dua tahun pekerjaan dengan defendan. Apabila

plaintif meninggalkan kontrak pekerjaan kelayakan untuk menggunakan kereta tersebut telah tamat dan kereta tersebut mesti kembali kepada defendan. Defendan tiada pada bila-bila masa berpisah dengan buku log atau pemunyaan kereta tersebut (lihat ms 469D–H).

(4) Sebagai tanda hakmilik, buku log atau kad pendaftaran atau sijil pendaftaran dalam borang yang ditetapkan dan di dalam milikan defendan menjadikan defendan di dalam kedudukan yang lebih baik daripada plaintif. Prima facie defendan adalah pemunya di sisi undang-undang dan mempunyai hakmilik yang lebih baik kepada kereta tersebut daripada plaintif (lihat ms 475C).

(5) Kes ini adalah kes luar biasa dan sangat jarang dengan darjah tinggi jaminan bahawa injunksi yang dipohon akan diberikan pada akhir perbicaraan. Mahkamah ini mempunyai kuasa untuk digunakan pada bila-bila masa untuk memberikan injuksi mandatori interlokutori meskipun fakta bahawa ia akan memberikan defendan keseluruhan remedi yang dipohon di dalam tuntutan balas tersebut. Setelah menimbangkan semua keadaan-keadaan kes ini terutamanya keperluan untuk memberikan perlindungan dan pelindung yang mencukupi kepada kedua-dua pihak, mahkamah mengarahkan kereta tersebut sepatutnya disimpan di premis Mahkamah Tinggi Johor Bahru (lihat ms 476A–C).]

Notes

For cases on interlocutory mandatory injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2223–2232.

Cases referred to

Achilli v Tovell [1927] 2 Ch 243 (refd)

A-G v Mid-Kent Ry Co & South Eastern Ry Co (1867) 3 Ch App 100 (refd)

Astro Exito Navegacion SA v Southland Enterprise Co Ltd & Anor (No 2) (Chase Manhattan BK NA Interverning); The Messiniaki Tolmi [1982] QB 1248; [1982] 3 All ER 335 (refd)

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

Bank Islam Malaysia Bhd v Tinta Press Sdn Bhd & Ors [1986] 1 MLJ 256 (refd)

Blakemore v Glamorganshire Canal Navigation (1832) 1 My & K 154 (refd)

Bonner v Great Western Railway Co (1883) 24 Ch D 1 (refd)

Burns v Dixon's Iron Works Ltd [1961] SC 102 (refd)

Candian Pacific Ry v Gaud & Ors [1949] 2 KB 239 (refd)

Central Newbury Car Auctions Ltd v Unity Finance Ltd & Anor (Mercury Motors Third Parties) [1956] 3 All ER 905 (refd)

Chang Kim Siong v PP [1968] 1 MLJ 36 (refd)

Charrington v Simons & Co Ltd [1971] 2 All ER 588 (refd)

Credit Corp (M) Bhd v The Malaysia Industrial Finance Corp & Anor [1976] 1 MLJ 83 (refd)
Collison v Warren [1901] 1 Ch 812 (refd)
Dover Picture Palace Ltd & Pessers v Dover Corpn and Crundall, Wraith, Gurr & Knight (1913) 11 LGR 971 (refd)
Gale v Abbott (1862) 8 Jur NS 987 (refd)
Gibb & Co v Malaysia Building Society Bhd [1982] 1 MLJ 271 (refd)
Goodson v Richardson (1874) 9 Ch App 221 (refd)
Great Northern Ry Co v Bradford Corp (1918) LJ 88 Ch 101 (refd)
Haji Mohamed Dom v Sakiman [1956] MLJ 45 (refd)
Hilti Far East Pte Ltd v Tan Hup Guan [1991] 3 MLJ 237 (refd)
Hubbard v Vosper [1972] 1 All ER 1023; [1972] 2 WLR 389 (refd)
Idris v PP [1960] MLJ 296 (refd)
Isenberg v East India House Estate Co Ltd [1863] 3 De GJ & Sm 263 (refd)
Jackson v Normanby Brick Co [1899] 1 Ch 438; (1899) 68 LJ Ch 407 (refd)
Johnstone v Royal Cts of Justice Chambers Co [1883] WN 5 (refd)
Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties) [1994] 3 MLJ 584 (refd)
Kelk v Pearson (1871) 6 Ch App 809 (refd)
Kennard v Cory Bros & Co Ltd [1922] 2 Ch 1 (refd)
Leisure Data v Bell [1988] FSR 367 (refd)
Locabail International Finance Ltd v Agro Export & Anor [1986] 1 WLR 657; [1986] 1 All ER 901 (refd)
Lord Manners v Johnson (1876) 1 Ch D 673 (refd)
Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406 (refd)
Marine Traders' Association's Agreement, Re (1964) LR 5 RP 225 (refd)
Marriott v East Grinstead Gas & Water Co [1909] 1 Ch 70 (refd)
McManus v Cooke (1887) 35 Ch D 681 (refd)
MBF Holdings Berhad v East Asiatic Co (M) Bhd [1995] 4 CLJ 73 (refd)
Mohamed Mydin v Ramiah [1965] MLJ 33 (refd)
Morris v Grant (1875) 24 WR 55 (refd)
PP v Toh Kee Huat [1965] 1 MLJ 76 (refd)
Puddephatt v Leith [1916] 1 Ch 200 (refd)
Redland Bricks Ltd v Morris & Anor [1970] AC 652 (refd)
Ryder v Bentham (1750) 1 Ves Sen 543 (refd)
Sajan Singh v Sardara Ali [1960] MLJ 52 (refd)
Shepherd Homes Ltd v Sandham [1971] Ch 340, [1970] 3 All ER 402 (refd)
Shiel v Godfrey & Co [1893] WN 115 (refd)
Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 (refd)
Smith v Smith (1875) LR 20 Eq 500 (refd)
Soon Teck Finance (M) Bhd v Public Finance Bhd [1988] 3 MLJ 417 (refd)
Sunny Ang v PP [1966] 2 MLJ 195 (refd)

Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener) [1992] 2 MLJ 434 (refd)
Thomas M Heysek & Anor v Boyden World Corp [1989] 1 MLJ 219 (refd)
Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192 (refd)
Ward & Anor v Public Prosecutor [1953] 19 MLJ 153 (refd)
Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok [1975] 2 MLJ 109 (refd)
Woodhouse v Newry Navigation Co [1898] 1 IR 161 (refd)

Legislation referred to

National Land Code 1965 s 89(a)
Penal Code ss 24, 378, 379A
Road Transport Act 1987 ss 2, 7(1), 8, 10(1), 11(1), 13, 109(1)

RR Mahendran (*RR Mahendran & Co*) for the plaintiff.
R Jayabalan (*Gana Muthusamy & Co*) for the defendant.

Abdul Malik Ishak J:

Enclosure 15

This was an application by the defendant in encl 15 pursuant to O 29 r 1 of the Rules of the High Court 1980 ('the RHC') for the following prayers:

(a) for a mandatory order compelling the plaintiff to immediately return a vehicle, a Proton Wira motorcar, bearing registration number JDL 3024 to the defendant;
(b) that costs of the application be borne by the plaintiff; and
(c) any other orders that this court deems fair and reasonable.

Enclosure 15 was supported by an affidavit deposed by Daniel Nathaniel on 24 September 1997 which was filed on 25 September 1997 as seen in encl 13. A reply to encl 13 can be seen in encl 18 which was affirmed by the plaintiff himself, Shamsudin bin Shaik Jamaludin, on 22 October 1997 which was filed on 23 October 1997. In response thereto, Daniel Nathaniel responded by affirming an affidavit in reply on 29 October 1997 which was filed on 1 November 1997 and this can clearly be seen in encl 23. Not to be outwitted, the plaintiff affirmed an affidavit in reply in encl 25 on 8 November 1997 which was filed on 11 November 1997. Finally, in encl 30, the plaintiff filed an affidavit in reply on 22 November 1997 which was affirmed on the same day. These were the relevant affidavits that must be considered in adjudicating encl 15. It is germane to mention that Daniel Nathaniel in deposing an affidavit in encl 13 referred to the writ of summons together with the statement of claim that was dated 29 January 1997 and filed on the same day as seen in encl 2. Reference was also made to the statement of defence and the counterclaim that was dated 27 March 1997 and filed on the following day as seen in encl 4. The reply and the

defence to the counterclaim was alluded to and this was dated 10 April 1997 and filed on the same day as reflected in encl 6. That being the case, the pleadings too were considered by this court in adjudicating encl 15.

Order 29 r 1 of the RHC states that an application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be. The counterclaim of the defendant centred on the conduct of the plaintiff which was said to have evinced an intention to abandon his contract of employment dated 24 October 1994. It was said that by that conduct the plaintiff had failed to give proper notice of termination as required under the contract of employment which stipulated a notice period of one month or one month's pay in lieu of notice. Flowing from that, the plaintiff was said to be liable to pay to the defendant a sum of RM7,000. The counterclaim too centred on the failure of the plaintiff to return the Proton Wira motorcar JDL 3024 to the defendant upon the plaintiff's abandonment of his contract of employment despite repeated requests. The defendant was said to be the registered owner of the motorcar in question. The counterclaim too, interestingly, referred to the plaintiff's misrepresentation of his true age when applying for employment with the defendant. It was said that the plaintiff was born in 1943 and he misrepresented his date of birth as: 10 March 1948. For that reason, it was said that the plaintiff was liable to be dismissed for such fraudulent misrepresentation. The defendant then proceeded to counterclaim for the following matters:

(1) Special damages in the sum of RM7,000;

(2) A mandatory order against the plaintiff to return to the defendant the Proton Wira motorcar bearing registration number JDL 3024;

(3) Damages for unlawful detention/conversion;

(4) Damages for fraudulent misrepresentation;

(5) Interest;

(6) Costs;

(7) Such further and other relief which this honourable court deems fit and proper.

It can thus be seen that the counterclaim advanced by the defendant incorporated an injunctive relief of a mandatory nature.

The law

It is a correct statement of the law to say that the power of granting a mandatory injunction must always be exercised with care and caution. For that matter, every application for an injunction, whether restrictive or mandatory, must be approached with a high degree of care (*Isenberg v East India House Estate Co Ltd* [1863] 3 De GJ & Sm 263 at p 272, per Lord Westbury LC) and the court has, in general, no hesitation whatsoever in granting a mandatory injunction in a proper case (*Smith v Smith* (1875) LR 20 Eq 500 at p 504; *Shiel v Godfrey & Co* [1893] WN 115 and *Charrington*

v Simons & Co Ltd [1971] 2 All ER 588). That the court is empowered to grant the equitable relief by way of an injunction can never be denied and in a situation where there is a remedy of mandamus available to the applicant, the court's power to grant the equitable relief by way of an injunction is not ousted at all (*A-G v Mid-Kent Ry Co & South Eastern Ry Co* (1867) 3 Ch App 100 at p 104, per Rolt LJ). Instances where the courts have granted mandatory injunctions are abound. Thus, the courts have granted a mandatory injunction to remove obstructions to light (*Jackson v Normanby Brick Co* [1899] 1 Ch 438 (CA)) and in many other fact situations and circumstances. In a situation where the injury done to the plaintiff cannot be estimated and compensated by damages the court would unhesitantly grant a mandatory injunction as was done in *Isenberg v East India House Estate Co Ltd.* It is interesting to refer the case of *Kennard v Cory Bros & Co Ltd* [1922] 2 Ch 1 (CA) and, briefly, that was a case where the defendants had openly tipped refuse which gave rise to a landslide damaging the plaintiff's property. The court made an order directing an inquiry as to damages with liberty to apply for a mandatory injunction to compel the defendants to keep open certain remedial works which had been executed by consent in the course of trial. Subsequently, the plaintiff applied for a mandatory injunction and the court held that as the costs of maintaining the remedial works were not recoverable under the inquiry as to damages, the plaintiff was entitled to a mandatory injunction to remedy the existing defects in the remedial works. The cases of *Kelk v Pearson* (1871) 6 Ch App 809 and *Smith v Smith* (1875) LR 20 Eq 500 lay down the following proposition of law: where the injury done to the plaintiff is so serious, grave and material that the restoration of things to their former condition is the only recourse where justice can be adequately done, a mandatory injunction would be granted. A mandatory injunction was granted in *Goodson v Richardson* (1874) 9 Ch App 221 where the damages that arose out of the trespass was only minimal and this decision was subsequently applied vigorously in *Marriott v East Grinstead Gas & Water Co* [1909] 1 Ch 70. The court too will exercise its jurisdiction and grant a mandatory injunction where the injury complained of is in breach of an express agreement (*Morris v Grant* (1875) 24 WR 55; *McManus v Cooke* (1887) 35 Ch D 681; *Lord Manners v Johnson* (1876) 1 Ch D 673; *Great Northern Ry Co v Bradford Corp* (1918) LJ 88 Ch 101 and *Achilli v Tovell* [1927] 2 Ch 243) and the court will not hesitate to grant a mandatory injunction even though the expense and trouble of obeying the injunction will be far in excess of any sum which could reasonably be awarded by way of damages (*Woodhouse v Newry Navigation Co* [1898] 1 IR 161 at p 168 (CA); and *Redland Bricks Ltd v Morris & Anor* [1970] AC 652 at p 666, [1969] 2 All ER 576 at p 580 (HL)).

The law books are replete with authorities on mandatory injunctions. The court certainly has the necessary jurisdiction to grant a mandatory injunction upon an interlocutory application (*Bonner v Great Western Railway Co* (1883) 24 Ch D 1 at p 10; *Collison v Warren* [1901] 1 Ch 812; *Candian Pacific Ry v Gaud & Ors* [1949] 2 KB 239 (CA); *Locabail International Finance Ltd v Agro export & Anor* [1986] 1 WLR 657, [1986] 1 All ER 901 (CA); *Shepherd Homes Ltd v Sandham* [1971] Ch 340, [1970] 3 All ER 402) and it was granted in *Astro Exito Navegacion SA v Southland*

Enterprise Co Ltd & Anor (No 2) (Chase Manhattan BK NA Intervening); The Messiniaki Tolmi [1982] QB 1248, [1982] 3 All ER 335 (CA), simply to secure the release of the purchase price before the expiry of the letter of credit. But in the absence of special circumstances, the court will be reluctant in granting the mandatory injunction (*Ryder v Bentham* (1750) 1 Ves Sen 543; *Blakemore v Glamorganshire Canal Navigation* (1832) 1 My & K 154; *Gale v Abbott* (1862) 8 Jur NS 987; *Johnstone v Royal Cts of Justice Chambers Co* [1883] WN 5 (CA); *Dover Picture Palace Ltd & Pessers v Dover Corpn and Crundall, Wraith, Gurr & Knight* (1913) 11 LGR 971 (CA); *Shepherd Homes Ltd v Sandham* [1971] Ch 340). If the injunction has the effect of requiring the performance of a certain act, like pulling down a building or to remove a building, it should be done in a mandatory form and not by an indirect method (*Jackson v Normanby Brick Co* (1899) 68 LJ Ch 407; *Puddephatt v Leith* [1916] 1 Ch 200; *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406 (HL) and *Re Marine Traders' Association's Agreement* (1964) LR 5 RP 225).

It is a correct assertion of the law to say and I so say that the *Cyanamid* guidelines (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396) cannot apply and are not relevant to mandatory injunctions. In adjudicating encl 15, this court must be certain that the application was unusually strong and clear before granting a mandatory injunction at the interlocutory stage. The court will not wring its hand and shirk from its duty under the law when it becomes necessary to order a mandatory injunction notwithstanding the fact that such an order has to be made ad interim and notwithstanding the fact that the high standard of probability of success at the trial has not been made out (*Leisure Data v Bell* [1988] FSR 367).

Section 53 of the Specific Relief Act 1950 enacts that when, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts. This very section was adverted to by the then Supreme Court in the case of *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192, and his Lordship Syed Agil Barakbah SCJ, delivering the judgment of the court had this to say at p 193 to 194 of the report:

> The discretionary power of the court to grant a mandatory injunction is provided by s 53 of the Specific Relief Act 1950. By judicial process, the power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases as was held in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 and confirmed by the Federal Court *in Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150. The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result. (See *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 at p 273 and *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at p 349.)

A Clearly therefore s 53 of the Specific Relief Act 1950 gives this court the jurisdiction and the discretion to grant a mandatory injunction as prayed for in encl 15. What the defendant was seeking for was more in the nature of an interlocutory mandatory injunction which the defendant sought for before the trial and all the authorities suggest that this court has that jurisdiction to grant it. The following array of local authorities would bear testimony to
B what I have said.

Abdoolcader J in *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 speaking for the then Federal Court had this to say (at p 150 of the report):

> C The first is that it is couched in prohibitory terms restraining the appellant until the trial of the suit from remaining in the quarters but it is in effect a mandatory injunction. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect (*Shepherd Homes Ltd v Sandham* [1970] 3 WLR 348 (at p 359); *Hounslow Local Borough Council v Twickenham Garden Developments Ltd* [1970] 3 WLR 538 (at p 570–571),
> D and as I said in my judgment in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109, an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases.
>
> The second is that the interlocutory injunction virtually gives to the
> E respondents on their claim the full relief actually sought to be secured at the final hearing, as I do not seriously think the respondents are really concerned about their claim for damages against a labourer. As I said however in *Wah Loong*, the court is not precluded from making such an order when the matter is viewed on a balance of convenience in the light of the principle enunciated in *Woodford v Smith* [1970] 1 WLR 806.

F Again, his Lordship Abdoolcader J in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 at pp 110–111 of the report brilliantly laid out the principles governing the grant or refusal of a temporary or interlocutory injunction in these words:

> G Before dealing with the facts of this matter raised in the course of the hearing of these two applications and the several contentions put forward on both sides, I think it might perhaps be useful and desirable to set out a synopsis of the well-established principles which govern the grant or refusal of a temporary or interlocutory injunction which are:
>
> (1) whether the plaintiff (and a defendant is for the purposes of his counterclaim in the position of a plaintiff) has made out a *strong prima*
> H *facie* case, showing a strong probability of the existence of the legal right on which he sues and a right to the final relief claimed; but the fact that the plaintiff has made out a prima facie case does not necessarily mean that an interlocutory injunction will issue as of course;
>
> (2) whether the *balance of convenience* is in the plaintiff's favour and requires an injunction to protect it, ie whether it would cause greater
> I inconvenience to the plaintiff if the injunction is not granted than the inconvenience which the defendant or persons claiming through him would be put to if the interlocutory injunction is granted;

(3) whether the plaintiff will in fact suffer *irreparable injury*; A

(4) whether the case is one in which in the event of success in the suit the plaintiff will not have a proper remedy in being awarded *adequate damages*;

(5) whether there is *clear necessity for affording immediate protection* to the plaintiff's alleged right or interest;

(6) the maintenance and preservation of the *status quo* pending the trial; B

(7) an interim or interlocutory mandatory injunction is never granted before trial except in exceptional and extremely rare cases;

(8) an injunction is a discretionary remedy granted only at the discretion of the court on the basis of the principles of equity and on a consideration of the facts and circumstances viewed in the light of the legal considerations hereinbefore adumbrated. C

It is germane to point out that in both these two cases (*Sivaperuman* and *Wah Loong*), Abdoolcader J stressed that an interlocutory mandatory injunction was never granted before trial save in exceptional and extremely rare cases.

D

Zakaria Yatim J (now FCJ) in *Bank Islam Malaysia Bhd v Tinta Press Sdn Bhd & Ors* [1986] 1 MLJ 256 at p 257 had this to say:

> The criteria for granting interlocutory mandatory injunction before trial have been laid down by the Federal Court in *Gibb & Co v Malaysian Building Society Bhd* [1982] 1 MLJ 271, 273. In that case, the court said: E
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> '... The case however must be unusually sharp and clear ... and the court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend, inter alia, upon considerations of hardship to the parties .... The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interests be protected by the immediate issue of an injunction ... . Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain protection at once .... If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial. F G
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> In *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at p 349, Megarry J said, "... the case has to be unusually strong and clear before a mandatory injunction will be granted ...".' H

and the decision of Zakaria Yatim J (now FCJ) was subsequently approved by Syed Agil Barakbah SCJ in *Tinta Press Sdn Bhd v Bank Islam (M) Bhd.*

Edgar Joseph Jr J (now FCJ) in *Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener)* [1992] 2 MLJ 434, succinctly said at p 446 of the report: I

> Since settling this judgment in draft, my attention has been drawn earlier today by counsel for the purchaser, to the judgment of the Court of Appeal in England in *Astro Exito Navegacion SA v Southland Enterprise Co Ltd & Anor*

A *(Chase Manhattan Bank NA intervening)* [1982] 3 All ER 335; [1982] QB 1248; [1982] 3 WLR 296 where it was held that under s 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, replaced by s 37 of the Supreme Court Act 1981, which is equivalent to, though not as widely drawn, as our para 6 of the Schedule to the Courts of Judicature Act 1964), the court has jurisdiction, where it appears just and convenient to do so, to order interim B relief by granting an interlocutory mandatory injunction to enforce a contractual obligation before trial. In so holding, the Court of Appeal had followed *Smith v Peters* (1875) LR 20 Eq 511 in which it was held that the court has jurisdiction to make *any* interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing of the cause.

The cases of *Astro and Smith v Peters* were cited with approval by the C Federal Court in *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45 wherein reference was also made to the provisions of O 92 r 4 which reminds the High Court of its inherent powers to make *any orders* as may be necessary to prevent injustice or to prevent an abuse of the process of the court. I am fortified in the conclusion at which I have arrived by these authorities.

D *Order accordingly.*

All these authorities compelled me to the conclusion that this court possessed the jurisdiction to grant an interlocutory mandatory injunction like the one sought for by the defendant in encl 15. This brings me to the next pertinent question of whether an interlocutory mandatory injunction E could be granted when its effect would be to provide the defendant, at this interlocutory stage, the final relief which this court could only rightly grant after the conclusion of the trial. As alluded to earlier, the defendant had filed a counterclaim praying, inter alia, for a mandatory order for the return of the Proton Wira motorcar JDL 3024 to the defendant. If this court granted F the prayer sought for in prayer (a) to encl 15, this meant that the defendant would be realising a final relief which it had prayed for in the counterclaim. I am fortunate that the authorities all favoured the grant of an interlocutory mandatory injunction notwithstanding the fact that it would give the defendant the whole remedy as prayed for in the counterclaim. References to some of these authorities will now be made. For a start, reference will be G made to the case of *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* where the headnote bore the following words:

> There is no reason when an interim or interlocutory injunction is either refused or later discharged why a subse-quent application cannot be made in the light of the changed circumstances or when otherwise so warranted. H Indeed it is settled law that when such an injunction is either refused or dissolved as the case may be, on the grounds that material facts had not been disclosed, the plaintiff nonetheless does not become anathema for all purposes but may, if he wishes make application de novo.
>
> Sometimes however the circumstances in which an interlocutory injunction is made are such that if an interlocutory injunction is granted the I benefit or advantages which the plaintiff thereby receives are all, or practically all, the benefit or advantages which are sought to be secured at the final hearing. It does not follow that in such a case an interlocutory injunction will be refused. The question remains one of the balance of convenience in all the circumstances.

Next, it would be the case of *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 (FC) where Abdoolcader J speaking for the then Federal Court had this to say at pp 273–274 of the report: A

(1) Whole relief granted by interlocutory order

The short answer to the issue raised in this respect is that the court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefor on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience (*Woodford v Smith* [1970] 1 WLR 806 (at pp 817-818); *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 at p 114; *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150). If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial (*Manchester Corporation v Connolly* [1970] 1 Ch 420 at p 427). B C

In *Bryanston Finance Ltd v De Vries* (No 2) [1976] 1 Ch 63 at pp 76, 81, Buckley LJ said (at p 76) that in relation to a petition for the winding-up of a company, the action (for an injunction to restrain the petitioner from petitioning for winding-up) as a whole is in the nature of an interlocutory proceeding. The court in that case held that the company was only entitled to interlocutory relief if on the available evidence it could be said that presentation of a petition would prima facie be an abuse of process, and Sir John Pennycuick said (at p 81): D E

> 'The decision in the case [1975] AC 396 was, as I understand it, addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action ... . I do not think the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue in the action ... .'

This is in effect a judicial acknowledgement on the lines of the observation by Lord Denning MR, in *Fellowes & Son v Fisher* [1976] QB 122 (at p 129) that an interlocutory decision is often for all practical purposes final, and indeed Lord Diplock in his judgment in the House of Lords in *NWL Ltd v Woods* [1979] 1 WLR 1294 (at p 1306) spoke to the same effect in discussing the decision of the House in *American Cyanamid Co v Ethicon Ltd.* F G

In the matter before us the purchasers' dispute is with the developer who they allege has defrauded them. It is further highly questionable whether the moneys purportedly paid by the purchasers to the developer without the knowledge or consent of the respondent for extras which were not however provided would in fact form part of the purchase price of the units to affect the ceiling stipulated in the Programme. The respondent has expended a very large sum of money to provide finance for the purchasers in this housing project and must necessarily have security by way of charges over the several units in question. Considering all the circumstances of this case, the rights of the parties and the balance of convenience in the matter, we are of the view that this is a case where the court is not precluded from granting the order sought although in effect the respondent would as a result secure the basic relief sought in the action. H I

A This would be followed by the case of *Thomas M Heysek & Anor v Boyden World Corp* [1989] 1 MLJ 219, where Chan Sek Keong J had to deal with the motion for an interlocutory mandatory injunction and this was what his Lordship said at p 222 of the report:

> In the present case, the defendants' application if granted, would amount to
> B substantially the entire relief claimed in the action. On the basis of the Court of Appeal's decision in *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657, the defendants are therefore required to show a clear case for relief or a high degree of assurance that the injunction, if granted, is rightly granted.
>
> However, the high degree of assurance required may be mitigated by the
> C justice of the case. In *Films Rover International v Cannon Film Sales Ltd* [1987] 1 WLR 670, Hoffmann J did not accept Megarry J's statement as one of principle but merely as a guideline. In that case, Hoffmann J was faced with a situation in which one party was being subjected to some form of duress. In essence, the facts were that the relevant plaintiff claimed that the defendant was obliged, under an agreement, to deliver certain films which the plaintiff
> D wished to distribute abroad. The defendant withheld the films in order to put pressure on the plaintiff to negotiate new (and better) terms for the defendant. The plaintiff, being placed in a position of having to capitulate or having no films, applied for a mandatory injunction. The defendant pleaded that there was no binding agreement between the parties. The application was dismissed by the court on this ground. On appeal, the Court of Appeal held that this issue should go to trial. The application for the mandatory injunction was then
> E re-heard by Hoffmann J who came to the conclusion that if the injunction was not granted (a) the plaintiffs might be forced to re-negotiate with the result that although they might have a good case they might be unable to bring it to trial and (b) it would enable the defendants to achieve a commercial objective by calculated disregard of the basic principle of a civil society that 'men perform their covenants when made'.
>
> F In granting the injunction, Hoffmann J said:
>
> '... there is no inconsistency between the passage from Megarry J and what was said in the *Cyanamid* case [1975] AC 396. But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as "guidelines", ie useful generalizations
> G about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial.
> H A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.
>
> I The passage quoted from Megarry J in *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at p 351, qualified as it was by the words "in a normal case", was plainly intended as a guideline rather than an independent principle. It is another way of saying that the features which

justify describing an injunction as "mandatory" will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the court feels a "high degree of assurance" that the plaintiff would be able to establish his right at a trial. I have taken the liberty of reformulating the proposition in this way in order to bring out two points. The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren. The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term "mandatory" to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline of 'exceptional' and therefore requiring special treatment. *If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.* (Emphasis added.)

... the Court of Appeal in *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657 at p 664, was not intending to "fetter the court's discretion by laying down any rules which would have the effect of limiting the flexibility of the remedy", to quote Lord Diplock in the *Cyanamid* case [1975] AC 396 at p 407. Just as the *Cyanamid* guidelines for prohibitory injunctions which require a plaintiff to show no more than an arguable case recognize the existence of exceptions in which more is required (compare *Cayne v Global Natural Resources Plc* [1984] 1 All ER 225), so the guideline approved for mandatory injunctions in the *Locabail* case recognizes that there may be cases in which less is sufficient.'

On the basis of Hoffmann J's decision, a less rigorous test is required where the withholding of a mandatory injunction may carry a greater risk of injustice than in granting it.

The case of *Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties)* [1994] 3 MLJ 584 (FC) would be another example of an interlocutory mandatory injunction which was granted notwithstanding the fact that it gave the whole remedy asked for in the action. Lamin FCJ speaking for the Federal Court had this to say at p 593 of the report:

It is argued that there have been cases where interlocutory mandatory injunctions have been granted before trial even though the full relief sought is secured by the respondents. Perhaps more in point is the case of *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25. This is a case where the respondent had applied for and obtained a mandatory injunction to remove the septic tank and fence which formed part of the appellant's premises but which had been constructed on the respondent's land. The appellant purchased Lot 126 with actual knowledge of the encroachment on the respondent's Lot 179. Full disclosures were made in the sale and purchase agreement as to the encroachment. Notwithstanding that, this court did point out that the respondent never gave his assent either expressly or impliedly to the continued existence of the septic tank and the fence on his land ever since he became

A aware of it in 1970. Similarly in the case before us. Here we wish to repeat that once a party and, in this case, the respondent/ plaintiff has established his legal right and of the fact of its violation, he is entitled to the perpetual injunction unless the appellant/defendant can show that there is something special in the circumstances of the case that will disentitle the respondent/plaintiff to the remedy he seeks.

B The facts about the encroachment in question in this case are unusually clear and sharp, constituting an unanswerable case of private nuisance for which an interlocutory mandatory injunction was the appropriate and necessary remedy even though it gave the whole remedy asked for in the action. Please see *Shepherd Homes Ltd v Sandham* [1971] Ch 340; [1970] 3 All ER 402; [1970] 3 WLR 348.

C At the end of the day, this court has to weigh in a balance the whole perspective of the case bearing in mind, always, the respective strengths of the parties' claim and defence and then decide the best course to take in the circumstances. As Lord Denning MR said in *Hubbard v Vosper* [1972] 1 All ER 1023 at p 1029; [1972] 2 WLR 389 at p 396:

D In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done.

I have said earlier that the ordinary *American Cyanamid* guidelines E governing applications for interlocutory injunctions are not applicable to mandatory injunctions and KC Vohrah J in *MBF Holdings Bhd v East Asiatic Co (M) Bhd* [1995] 4 CLJ 73 held the same view when his Lordship said at p 76 of the report:

The ordinary *American Cyanamid* principles are not applicable in an F application for a mandatory injunction. In the case of a mandatory interlocutory injunction for its grant there must be a high degree of assurance that at the trial it will appear that the injunction was rightly granted (*Shepherd Homes Ltd v Sandham* [1971] Ch 340; *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657). This is far more than is required for a prohibitory injunction to which the *American Cyanami*d principles apply. As put by LA Sheridan (at p 35):

G

> 'That may be no more than a way of saying that the balance of convenience is more often against a mandatory injunction than it is against a prohibitory injunction at the interlocutory stage because an interlocutory mandatory injunction is more likely to involve the defendant in expenditure, more likely to be the final determination of the dispute and more difficult to compensate if the defendant wins at the H trial.'

In *Jakeman v South West Thames Regional Health Authority* [1990] IRLR 62, Auld J said that in the absence of special circumstances an interlocutory mandatory injunction would not be granted unless the case was clear and one which should be decided at once.

I I cannot help but observe that in cases where the parties sought for an interlocutory mandatory injunctions, the principles enunciated in the *American Cyanamid* have not been followed and at the most it was referred

to in passing only. In my judgment, the conditions to be fulfilled before an interlocutory mandatory orders to be granted may be listed as follows:

(1) The applicant must prove by affidavit evidence that his application is an exceptional and extremely rare case which merits the order prayed for.

(2) The applicant must show that his case is clear and one which the court thinks ought to be decided at once in his favour.

(3) The applicant must show a clear case for relief or a high degree of assurance that the injunction, if granted, would rightly be granted.

And this list is not exhaustive for it may expand from time to time as the years go by. Perhaps it would be wise to refer to the decision of Lord Upjohn in the case of *Redland Bricks Ltd v Morris & Anor* [1970] AC 652, [1969] 2 All ER 576 where his Lordship in brilliant style laid down the principles governing the grant of a mandatory injunction. This was what his Lordship said ([1970] AC 652 at pp 665–667, [1969] 2 All ER 576 at pp 579–581):

> *Isenberg v East India House Estate Co Ltd* [1863] 3 De GJ & S 263 and *Durell v Pritchard* [1865] 1 Ch App 244 have laid down some basic principles, and your Lordships have been referred to some other cases which have been helpful. The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be 'as of course.' Every case must depend essentially on its own particular circumstances. Any general principles for its application can only be laid down in the most general terms:
>
> (1) A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. As Lord Dunedin said in *AG for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd* [1919] AC 999 at p 1005 it is not sufficient to say 'timeo'. It is a jurisdiction to be exercised sparingly and with caution but, in the proper case unhesitatingly.
>
> (2) Damages will not be a sufficient or adequate remedy if such damage does happen. This is only the application of a general principle of equity; it has nothing to do with Lord Cairns' Act, ie the Chancery Amendment Act 1858 or *Meux's* case [1895] 1 Ch 287; [1891–94] All ER Rep 838.
>
> (3) Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act the question of the cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account:
>
> (a) where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff. As illustrative of this see *Woodhouse v Newry Navigation Co* [1898] 1 IR 161;
>
> (b) but where the defendant has acted reasonably, although in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. First, because no legal wrong has

yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only on a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the plaintiff is in no way prejudiced for he has his action at law and all his consequential remedies in equity.

So the amount to be expended under a mandatory order by the defendant must be balanced with these considerations in mind against the anticipated possible damage to the plaintiff and if, on such balance, it seems unreasonable to inflict such expenditure on one who for this purpose is no more than a potential wrongdoer then the court must exercise its jurisdiction accordingly. Of course, the court does not have to order such works as on the evidence before it will remedy the wrong but may think it proper to impose on the defendant the obligation of doing certain works which may on expert opinion merely lessen the likelihood of any further injury to the plaintiff's land. Sargant J pointed this out in effect in the celebrated 'Moving Mountain' case, *Kennard v Cory Bros & Co Ltd* [1922] 1 Ch 265 at pp 274, 275 (his judgment was affirmed in the Court of Appeal [1922] 2 Ch 1).

(4) If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.

This has been well settled for a long time and I regret that I cannot agree with Danckwerts LJ ([1967] 3 All ER at p 5; [1967] 1 WLR at pp 973, 974), that the observations of Joyce J, in *A-G v Staffordshire County Council* [1905] 1 Ch 336, pp 342, 343 have not been followed in practice. My experience has been quite the opposite. There may be some cases where, to revert to the simple illustration I gave earlier, the defendant can be ordered 'to restore the right of way to its former condition.' This is so simple as to require no further elucidation in the court order. But in anything more complicated the court must in fairness to the defendant tell him what he has to do, though it may well be by reference to plans prepared by some surveyor, as pointed out by Sargant J, [1922] 1 Ch at pp 274, 275 in the passage in the 'Moving Mountain' case to which I have already referred. The principle is summed up by Maugham LJ, in *Fishenden v Higgs and Hill Ltd* [1935] All ER Rep 435 at p 450; 153 LT 128 at p 142:

> 'I should like to observe, in the first place, that I think a mandatory injunction, except in very exceptional circumstances, ought to be granted in such terms that the person against whom it is granted ought to know exactly what he has to do.'

My Lords I shall apply these principles or conditions to this case, and I can do so very shortly.

So much for the law.

I will now examine the facts and apply the law accordingly.

Factual matrix of the case

The defendant's application in encl 15 was put on a priority list as it was supported by a certificate of urgency as reflected in encl 12. There was an undertaking as to damages as seen in encl 15 and adverted to at length by

the defendant in para 28 of encl 13 — the affidavit in support affirmed by Daniel Nathaniel. A

It was abundantly clear that the defendant was seeking in encl 15 for the immediate return of the Proton Wira motorcar JDL 3024 as the vehicle was, on the date of the hearing of encl 15, in the possession of the plaintiff.

Under the contract of employment the plaintiff was employed as the B divisional manager of the defendant's company overseeing the general administration of the defendant's company. The plaintiff started work with the defendant from 1 December 1994 as reflected in the defendant's offer of employment in exh 'DN1' of encl 13 and under it the plaintiff was eligible to a company car. It must be borne in mind that 'eligibility' can never be equated with 'entitlement'. And so the plaintiff was given a Proton Wira C motorcar JDL 3024 for his use and the plaintiff took delivery of the said motorcar on 13 January 1995 as reflected in exh 'DN2' of encl 13. The plaintiff successfully completed the probation period of six months. There is a famous adage which says that a new broom sweeps well and this new broom in the person of the plaintiff, so to speak, was no exception. Somehow as the going gets tough, the tough gets lazy and so we have the D situation of 'absenteeism.' The plaintiff was absent from his work for periods between 11 September 1996 to 19 September 1996 and between 30 September 1996 to 1 October 1996. It seemed that the plaintiff was also absent from work on other dates, the full details of which will be adduced at the trial proper — so said the defendant. The defendant issued two E warning letters. One dated 1 October 1996 (exh 'DN4' of encl 13) and the other dated 2 October 1996 (exh 'DN5' of encl 13). These two warning letters were sent to the plaintiff so that the latter would improve his attendance and in the words of the second warning letter: 'If your attendance still does not meet this company's requirement, I shall be F obliged to take more strict disciplinary action against you amounting to termination of your services'. Sadly, there were no improvements in attendance shown by the plaintiff. From 8 October 1996, the plaintiff continued to be absent from work and the defendant held to the view that the continued absence from work constituted a fundamental breach of the contract of employment tantamount to an abandonment of his contract of G employment. The defendant by letter dated 1 November 1996 (exh 'DN6' of encl 13) informed the plaintiff of this fundamental breach of the contract of employment and requested the plaintiff, inter alia, to return the Proton Wira JDL 3024 — the company car. But the plaintiff, to date, failed to return the said car.

Pursuant to the plaintiff's abandonment of his contract of employment, H the defendant duly inserted a notice in the press informing the public that the plaintiff was no longer in their employment and that he had no authority to transact any business on their behalf.

It was undisputed that the defendant is still the registered owner of that motorcar JDL 3024 as demonstrated by the logbook in exh 'DN12' of encl 13. Since the purchase of that motorcar, the defendant continues to be I and is the legal owner of that precious Proton Wira motorcar. The defendant had also taken the responsibility for the maintenance and safekeeping of the said motorcar. It is now apparent that the plaintiff has not

A disputed the ownership and registration of the said motorcar in favour of the defendant. That the defendant remains the registered owner of the motorcar is beyond dispute. Of pertinence to note would be the admission by the plaintiff in his letter dated 21 October 1996 as seen in exh 'SSJ-7a-m' in encl 18 to the effect that the defendant was paying the bills for the maintenence of the said motorcar. That being the case, the plaintiff's stand B that he is the beneficial owner of the Proton Wira motorcar falls down like a deck of cards; it was a stand that was both untenable in fact and in law. In short, the sting of the defendant's submission went to the heart of the matter: that the plaintiff was merely eligible to use the motorcar in the course of his employment with the defendant and no more. After the C plaintiff left the employment of the defendant's company he had the audacity to take the motorcar with him without returning the same to the defendant notwithstanding the defendant's request as adverted to earlier in the defendant's letter dated 1 November 1996. The defendant frantically searched for the whereabouts of the plaintiff and the Proton Wira motorcar. This necessitated the lodging of a police report by Daniel Nathaniel on D 14 November 1996 vide Larkin Report No 3625/96 as reflected in exh 'DN8' of encl 13. The plaintiff played possum and he failed to inform the defendant as to the whereabouts of the said motorcar and this resulted in the delay on the part of the defendant to locate that precious motorcar. By sheer grit, the defendant came to know that the plaintiff was keeping the said motorcar in Kuala Lumpur and without furtherado, Daniel Nathaniel E lodged a police report on 27 January 1997 at the Dang Wangi police station. Despite lodging the two police reports, efforts to recover the Proton Wira motorcar proved futile.

The defendant then engaged a firm of solicitors to act for them. Messrs Gana Muthusamy & Co, acting for the defendant, sent a letter to F the plaintiff's solicitors dated 21 April 1997 enquiring as to the whereabouts of the Proton Wira motorcar but unfortunately this simple request was not acceded to at all (see exhs 'DN11a-b' and 'DN12' of encl 13). It was exasperating to say the least. The final salvo came when the defendant received a police summons as reflected in exh 'DN13' of encl 13. No doubt that police summons bore the date of the traffic offence as 20 July 1996 at G 8.53am when the plaintiff was still in the employment of the defendant but the police summons jolted the defendant to the reality of things. The defendant realised that so long as the plaintiff, an ex-employee, has in his possession the Proton Wira motorcar the defendant would be exposed to more police summonses.

H In my judgment, the delay of the defendant in filing encl 15 was explained and must be accepted by this court. The defendant had, at all times, tried to locate and recover the Proton Wira motorcar but to no avail and with this humiliating failure the defendant had no choice but to file encl 15.

I The plaintiff's affidavit in reply in encl 18 failed to advance any valid reasons for the plaintiff to continue keeping possession of the Proton Wira motorcar. Lest I be accused of an oversight, there was an averment in para 6 of encl 18 to the effect that there was a promise that the said motorcar would be transferred to the name of the plaintiff upon completion of two years of

employment with the defendant. But alas, the plaintiff failed to substantiate his allegation of an oral promise and the reliance by the plaintiff of the fax message from Etsuko Tosaki marked as exh 'SSJ-1' of encl 18 was totally misplaced and taken out of its context. Exhibit 'SSJ-1' of encl 18 was totally silent about the use of the company car and, consequently, the submission that that exhibit was of no relevance was of great significance and it went a long way to support the defendant's application in encl 15. Incidentally, the averment by Daniel Nathaniel in encl 13 particularly at para 24 added a different complexion to the whole matter — there it was categorically deposed that it was not the policy of the defendant's company, be it in the past or the present, of transferring company cars to its employees. Even the defendant's offer of employment in exh 'DN1' of encl 13 did not specify that the company car, namely Proton Wira would be transferred to the plaintiff upon completion of two years employment with the defendant. Not to be outwitted and in an attempt to substantiate the allegation of the oral promise, the plaintiff annexed a letter marked as exh 'SSJ-2' of encl 18 to show that there was a request by the plaintiff to the defendant's company to make the arrangement for the transfer of the Proton Wira motorcar to the plaintiff. The defendant was quick on the uptake and it was the defendant's stand that they had never received such a letter and of significance would be the vehicle number referred to in that letter which was entirely different from the registration number of the Proton Wira motorcar in question — the subject matter of the application in encl 15. That letter meaning the letter marked as 'SSJ-2' of encl 18 referred to vehicle bearing registration number JDL 3027 whereas the motorcar under dispute bore registration number JDL 3024. Two observations must be made here. Firstly, this was the first time the plaintiff brought to light the existence of such a letter. Secondly, this very letter was never referred to in the previous correspondence between the plaintiff and the defendant — not even in the letter dated 21 October 1996 (exh 'SSJ-7a-m' of encl 18) nor in the letter dated 6 November 1996 from the plaintiff's solicitors to the defendant (exh 'SSJ-7a-m' of encl 18). It was thus not surprising that the defendant in para 24 of encl 13 denied that there was ever such an oral promise to transfer the company motorcar to the plaintiff. In the statement of defence, at para 2(c)(i), the defendant averred, inter alia, that:

> The plaintiff and defendants did not enter into any oral or written agreement that the car would be transferred to the plaintiff upon the events mentioned in para 3(c)(i) of the statement of claim. The plaintiff is also put to strict proof thereof of assertions relating to transfer of ownership.

It follows as the night the day, that the plaintiff had failed to substantiate his allegation that there was such an oral promise. In fact, all the terms pertaining to the plaintiff's employment were embodied in the defendant's offer of employment as seen in exh 'DN1' of encl 13.

An argument was advanced on behalf of the defendant to the effect that the defendant being the registered owner of the Proton Wira motorcar is constantly exposed to the risk of legal proceedings should the said motorcar be used or being involved in any unlawful purpose or being involved in any road collision. The possibility of these occurrences can never be denied as the said motorcar is currently in the possession of the plaintiff, at the time

of the hearing of encl 15. It was further argued that if these mishaps were to happen, the defendant's image would be seriously tarnished and the reputation of the defendant as the leading electronics firm in this country would likewise be marred. The police summons in exh 'DN13' of encl 13 as alluded to earlier, was an example of that risk. The continued usage of the Proton Wira motorcar by the plaintiff, if unabated, would certainly give rise to dire consequences to the defendant.

The affidavit in reply of the plaintiff in encl 25 exhibited a road tax marked as 'SSJ-1' and it appeared to be a valid road tax for the Proton Wira JDL 3024. As to how the plaintiff managed to obtain a valid road tax slip with a payment of only RM50 when the log book or the registration card or the registration certificate in the prescribed form of the said motorcar is in the defendant's possession, at all material times, and bearing in mind that the defendant is the registered owner of the said motorcar — must only be known to the plaintiff and no one else. In his statement of claim, the plaintiff sought for the following prayers:

(a) an order that the plaintiff be re-instated in his former employment.

(b) alternatively, general damages.

(c) special damages at RM22,800.

(d) a declaration that the plaintiff is entitled as of right to the transfer of the Proton Wira JDL 3024 in his name and that the defendant be ordered to transfer the ownership of the said motorcar to the plaintiff.

(e) interest on the general and special damages at the rate as determined by the court.

(f) costs.

(g) other reliefs which the court deem fit.

This was a case where an ex-employee during his tenure of employment with the defendant failed to apply for his leave before he went on leave. This was a case of an ex-employee who suffered serious diabetes and was admitted to the Johor Specialist Hospital and upon his discharge sought for traditional medical attention during his tenure of employment with the defendant but failed to obtain the necessary leave from his superiors prior to his absence. The letter from Mr Hironori Yamada, Managing Director of the defendant's company dated 1 October 1996 addressed to the plaintiff makes for interesting reading. I need to reproduce paras 3, 4, 6 and 8 of that letter as these paragraphs would give a bird's eye view of the whole matter (see exh 'SSJ-7(a)-(m)' of encl 18):

> 3 As you are fully aware, our office hour starts at 8.00 am and we arrive (at) the office latest by 7.40 am everyday. There is no reason why you could not contact myself or Mr N Shiratori in the morning. Please be reminded that most of us are staying back in the office until late in the evening (normal 8.00 pm); its convenient for you to contact us anytime.
>
> 4 As a Senior Management staff, (the) company has furnished you (with) a set of hand-phone and a list of management staff telephone directory to enable you to contact any one of us anytime and wherever you are. Base (d) on the past, you have been contacting us (myself and Mr N Shiratori) at odd hours (during public holiday/rest day/after office hour) regularly through our hand-phones.

6 Base (d) on our record, your movement(s) from 11 September 1996 till 19 September 1996 (were) not clearly reported. The only information through telephone messages was (that) you were having traditional treatment in (the) Kampung. You did not report to your superior directly about your health condition and your movement(s) and there was no application of leave done. A

8 During my explanation and discussion with you on 23 September 1996 and 25 September 1996, regarding your 'late' application of leave, you also agreed that if your staff were to submit the application of leave 'late', you would also reject his application. This shows that you fully agreed and understood that your leave application did not follow the company's proper procedure. B

From the tenure of these paragraphs it would be apparent that the plaintiff did not contact his superiors before he was absent from work. His superiors were available from 8 am to 8 pm in the office and the plaintiff was accorded the use of a handphone and was given the telephone directory of the management staff, yet the plaintiff saw it fit not to contact them. Put bluntly, the plaintiff did not contact his superiors directly in regard to his health condition and his movements nor did he apply for the necessary leave of absence. The plaintiff agreed that he himself would not approve any late application for leave by his own staff. There is a saying to the effect that when you are in Rome, you must do like what the Romans do. Here, the policy of the defendant's company in regard to the manner of applying for leave, though known to the plaintiff, was not followed by the plaintiff at all. The practice of absenting oneself from work is known as 'absenteeism' as seen in and in accordance to the *Concise Oxford Dictionary* (9th Ed) and the plaintiff squarely falls under this category. C D E

Following dutifully the case of *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd*, the defendant advanced two grounds to show that this was an exceptional and extremely rare case for the grant of an interlocutory mandatory injunction. These two grounds may conveniently be stated as follows: F

(1) The defendant is currently the registered owner of the Proton Wira motorcar JDL 3024 as shown in the logbook or the registration card or the registration certificate in the prescribed form (para 22 of encl 13). G

(2) As the registered owner of the Proton Wira motorcar JDL 3024, the defendant is invariably exposed to police summonses (paras 25 and 26 of encl 13).

An argument was advanced for the plaintiff to the effect that the defendant being the registered owner of the Proton Wira motorcar JDL 3024 cannot vest the defendant with the legal or beneficial ownership of the said motorcar. For this exercise, I need to examine some authorities. The case of *Central Newbury Car Auctions Ltd v Unity Finance, Ltd & Anor (Mercury Motors Third Parties)* [1956] 3 All ER 905 (CA) is a good starting point. In that case, Denning LJ writing a strong dissenting judgment had this to say at p 912 of the report: H I

> ... Everyone knows that the log-book is good evidence of title; see *Pearson v Rose & Young, Ltd* [1950] 2 All ER 1027. The wise owner keeps it at home or

A in a place separate from the car. Thieves who steal cars know it well enough. Hence the devices to which the criminal courts become accustomed. If a thief wishes to dispose of a stolen car, not having its log-book, he will get hold of the logbook of some other car and alter the number of the stolen car to conform with the number in the log-book, or he will alter the number in the log-book to correspond with the number of the car. To dispose of a car B without the log-book is as difficult as to dispose of land without the title deeds. In each case the thief must resort to forgery if he wishes to get rid of it to an innocent person. The plaintiffs must have been aware of the importance of the log-book. They must have known that, when they handed both car and log-book over to Cullis, they were arming him with complete dominion over it, subject only to the rights of the finance company which they assumed C would come into force but which were not in fact then in force, as they well knew. They clearly intended to reserve no dominion over the car themselves.

Next, it would be the case of *Mohamed Mydin v Ramiah* [1965] MLJ 33 (FC), which involved the sale by a written agreement between V Shaik Dawood and the defendant whereby the latter agreed upon certain terms as set out therein to buy the business of the former as a going concern together D with all the stock-in-trade including the lorry. V Shaik Dawood then executed a deed assigning and transferring all his right title and interest in the business to the defendant absolutely. The defendant in turn entered into an agreement with the plaintiff for the sale by the defendant to the plaintiff of the same business including the lorry. Both the defendant and the E plaintiff later executed a deed whereby the defendant assigned and transferred all his right title and interest in the business to the plaintiff absolutely. Later, a dispute arose between the plaintiff and the defendant. The plaintiff alleged that the defendant had failed to deliver the lorry to him. The plaintiff then sued the defendant for the sum of $5,000 which was the amount at which he valued the lorry. The trial judge held that the lorry had F not been delivered to the plaintiff and the trial judge also expressed the view that the defendant had failed to put the lorry into a deliverable state and therefore the property in the lorry had not passed to the plaintiff. The trial judge then gave judgment for the plaintiff for the sum of $3,500 being the amount at which he assessed the value of the lorry. Against this judgment, an appeal was lodged. Tan Ah Tah FJ writing for the Federal Court allowed G the appeal with costs and he set aside the judgment of the trial judge. His Lordship held that the sale of the lorry can be complete and effective even though the registration book, which was not a document of title, was not made available to the buyer and his Lordship was of the view that the trial judge should have held that the lorry was duly delivered to the plaintiff. This was what his Lordship said as seen at p 34 of the report:

H

> As to the question whether the property in the lorry had passed to the plaintiff it is necessary to refer to ss 20 and 21 of the Sale of Goods (Malay States) Ordinance 1957 which read as follows:
>
> 20 Where there is an unconditional contract for the sale of specific goods in I a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods, or both, is postponed.
>
> 21 Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into

a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof. A

The learned trial judge expressed the view, which I agree, that the indenture dated 25 February 1957 was clearly in the nature of an unconditional contract for the sale of specific goods. However, he went on to say that the lorry was not in a deliverable state and gave as a reason for that view the fact that the defendant had not taken the necessary steps to cause the lorry to be registered in the plaintiff's name. B

In my opinion, the learned trial judge was unduly concerned with the fact that the registration book was not made available to the plaintiff. There is no doubt that he took this fact into account when he decided that the lorry had not been delivered to the plaintiff and that the property in the lorry had not passed to the plaintiff. C

The legal position of the registration book has been considered in several cases. One of these is the case of *Sajan Singh v Sardara Ali* [1960] MLJ 52 (PC) where Lord Denning, who delivered the judgment of the Privy Council, said (at p 54):

'Their Lordships do not overlook the fact that the defendant remained registered as the owner of the lorry and that no permission was given for the sale: but this did not prevent the property in it passing to the plaintiff. The registration book is not in Malaya, any more than it is in England, a document of title. The title passed by the sale and delivery of the lorry to the plaintiff. The absence of registration would no doubt put the plaintiff in difficulty if he had to prove his title, but it would not invalidate it, see *Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd Winsor Garage, Third Party* [1949] 1 KB 322 at p 338.' D E

It is clear that the sale of a lorry can be complete and effective even though the registration book is not made available to the buyer. Bearing that in mind, I am of opinion that the learned trial judge should have held that the lorry in the present case was duly delivered to the plaintiff in February 1957. Indeed, the lorry was, in my judgment, in a deliverable state on 25 February 1957, and the property in it therefore passed to the plaintiff on that day. The fact that the ignition key was in Shaik Dawood's possession makes no difference. A new ignition key could have been easily made or purchased. Moreover, the evidence shows that the plaintiff took delivery of the lorry through Ng Boon Yong, who must be regarded as having been his servant or agent. The plaintiff must therefore be deemed to have waived his right to have the ignition key delivered to him. F G

Credit Corp (M) Bhd v The Malaysia Industrial Finance Corpn & Anor [1976] 1 MLJ 83 is another case worth looking into. The facts in that case may be stated as follows. The plaintiffs purchased a car and entered into a hire purchase agreement with a hirer. The car was registered in the name of the hirer with the plaintiff's claim for ownership indorsed on the register and the registration card. The first defendant purchased the car from a third party and entered into a hire purchase agreement with the second defendant. After terminating the hire, the plaintiffs repossessed the car. The plaintiffs thereupon sought a declaration that they were the owners of the car. The defendants counterclaimed for trespass, conversion and wrongful detention and damages. Abdul Hamid J (who later rose to be the Lord President of H I

A the Supreme Court) was of the view that upon the true construction of the plaintiffs' agreement which was of a type to which the Hire Purchase Act applied, until the hirer had exercised his option to purchase the car by paying the total rentals and fulfilling all his obligations under the agreement, no property in the car passed to the hirer. His Lordship was also of the view that even though the hirer was the registered owner of the car he was only B in law the person who had possession and use of the car and this fact did not necessarily make him the legal owner of the car. It is perhaps apt to refer to the judgment of his Lordship and for this purpose reference should be made at pp 85 to 86 of the report where his Lordship succinctly said:

> In construing the plaintiffs' agreement, I have given careful consideration to C the submissions made by both Mr Narayanan and Miss Chen Kah Leng. In the instant case, it is pertinent to note that the agreement between the plaintiffs and the hirer was concluded with particular reference to the Act and it is set out therein a notice to the hirer under s 4 of the Act embodying the Third Schedule of the Act which, inter alia, provides that if the hirer is unable to pay his instalments, he is entitled to return the goods to the plaintiffs at the D hirer's own expense but if he does that, he will be liable to pay an amount sufficient to cover the loss suffered by the plaintiffs.
>
> In consideration, I form the view that upon the true construction of the plaintiffs' agreement, and I find that the hirer was in effect under no obligation to buy but had an option either to return the car or become its owner by payment in full as in *Helby v Matthews* [1895] AC 471.
>
> E In arriving at my finding I have also directed my mind to the provisions of the Act as to their effect on such an agreement. Section 11 of the Act which deals with assignment of rights under hire-purchase agreement seems to acknowledge the right or title of a hirer under a hire-purchase agreement and clearly stipulates that an assignment may only be made with the consent of the owner. The right to complete the agreement at any time in accordance with F s 13 is a further acknowledgment of the act of the hirer's right of option to purchase. For these reasons it is untenable to construe that the provisions in the Act concerning such rights should establish that the hirer had agreed to buy.
>
> The learned author in *Hire-Purchase Law* by Else Mitchell also considered the effect of the English Hire-Purchase Act when applied to certain G agreements to sell of the *Lee v Butler* type as well as to pure hire-purchase agreements. At p 215 the learned author had this to say:
>
> > '... The Act however gives the hirer a statutory right to return the goods and a question arises as to whether the application of s 28(2) of the Sale of Goods Act 1923, to agreements of the *Lee v Butler* type is affected. It is submitted that a hirer who has a statutory right to return the goods H cannot be a 'person who has agreed to buy' within the meaning of those words in s 28(2) of the Sale of Goods Act ... If this be correct, then in accordance with the principle of *Helby v Matthews* it is not now possible for a hirer under a hire-purchase agreement to which this Act applies to give a good title to a third person under s 28(2) of the Sale of Goods Act, whether the agreement is in form an agreement to buy or a pure I hire-purchase agreement. ... '
>
> In the present case, it is my finding upon the true construction of the plaintiffs' agreement, that it is a type of hire-purchase agreement to which the Act

applies such that until the hirer has exercised his option to purchase the car by paying the total rentals and fulfilling all of his obligations under the plaintiffs' agreement, no property in the car passes to the hirer. The hirer is only a bailee, and, consequently, cannot pass a good title to a third party. In the final analysis it is my view that s 30(2) of the Ordinance cannot therefore apply as the title had not effectively passed to the hirer (*Lee v Butler*) as the hirer had not bought or agreed to buy within the meaning of s 30(2) of the Ordinance.

Mr Narayanan also submitted that s 29 of the Ordinance read with s 19 of the Contracts (Malay States) Ordinance 1950 (for easy reference I reproduce both sections hereunder) shall form a basis upon which title can pass under the law.

Section 29 of the Sale of Goods Ordinance 1957:

> 'Where the seller of goods has obtained possession thereof under a contract voidable under s 19 or s 20 of the Contracts (Malay States) Ordinance, 1950, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title.'

Section 19 — Contracts (Malay States) Ordinance 1950:

> 'When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.'

Mr Narayanan argued that if the hirer practised fraud upon the plaintiffs and obtained the release of the ownership claim thereby granting full rights to the hirer, then a voidable title would have arisen. In that event it becomes the duty of the owner to avoid it within time. Whether he did avoid it is a question of fact. Mr Narayanan also argued that the plaintiffs had full knowledge of the release of ownership claim but no attempts were made to avoid by making a police report or by reporting to the Registrar and Inspector of Motor Vehicles.

With respect I am unable to see any merit in the argument. Section 29 of the Ordinance speaks of sale by person in possession under voidable contract and for purposes of the present case that contract can only mean the plaintiffs' agreement and it follows that the hirer who is the seller for purposes of that section obtained possession of the car. Now, under s 19 of the Contracts (Malay States) Ordinance 1950, an agreement is a contract voidable when consent to an agreement is caused by coercion, fraud or misrepresentation. The hirer did obtain possession under the plaintiffs' agreement but it was lawfully obtained. In these circumstances I fail to see how this court can sustain the defendants' allegation, if any, that the plaintiffs' agreement was a voidable contract. In the present case there is no evidence that fraud was perpetrated and if at all there was not at the time when the hirer was given possession of the said car but subsequently by the person who had everything to gain by it, not upon the plaintiffs but upon the Registering Authority to cause him to cancel the endorsement of the plaintiffs' ownership claim in the Register. For this reason I form the view that s 29 of the Ordinance would have no application to the present case.

The final case to refer to would be that of *Ng Ngat Siang v Arab-Malaysian Finance Bhd & Anor* [1988] 3 MLJ 319, a decision of Siti Norma Yaakob J (now JCA). At p 322 of the report, her Ladyship said:

> 'The fact that the registration card was still in the second defendant's possession after 23 September 1986 is not disputed but mere possession alone does not give the second defendant the apparent authority to sell

A the car, as the registration card itself is not a document of title and it cannot be assumed that a person in possession of it is the legal owner of the car. This was so decided in *Central Newbury Car Auctions Ltd v Unity Finance Ltd & Anor* [1956] 3 All ER 905, a decision that had been adopted by our own courts in *PP v Europe Motors Sdn Bhd* [1981] 2 MLJ 93. Furthermore all registration cards of vehicles registered under the B Road Traffic Act 1958 carry an endorsement of like effect in Bahasa Malaysia as follows:

> 'Pemilik berdaftar ialah orang yang menyimpan kereta itu. Ia boleh jadi atau tidak pemilik sah bagi kereta itu'.

Factually all these four authorities are poles apart from the present case. C The case of *Central Newbury Car Auctions, Ltd v Unity Finance Ltd & Anor (Mercury Motors Third Parties)* was a case of an appeal by the plaintiffs from decision of His Honour Judge Kirkhouse Jenkins of Newbury County Court when he dismissed the plaintiffs' action, which was an action for damages for conversion of a motorcar, on the ground that they were estopped by their conduct from denying the title of third parties to the car. The third parties D had bought the car in good faith from a swindler, to whom the plaintiffs had delivered the car with its registration book in anticipation of a hire purchase transaction for the acquisition of the car from them becoming binding. The plaintiffs were motor dealers and the true owners of the car. From them one Cullis acquired the car on a purported hire-purchase transaction and sold it to the third parties, who also were motor dealers, representing himself to E them by a different name as the last purchaser named in the car registration book, possession of which and also of the car had been delivered to him by the plaintiffs. From the third parties the car was acquired by the second defendant by hire-purchase, the car being sold on that transaction to the first defendant, a finance company. At p 915 of the report, Hodson LJ had F this to say:

> ... In my judgment the case falls to be determined, not on a consideration of negligence, but on what is the nature of the representation made by the delivery of the registration book. The book itself is not a document of title; its terms negative ownership and it contains no representation by the plaintiffs or anyone else that the thief was entitled to deal with the car as his own. I think G that counsel for the plaintiffs was right in saying that, while a person in possession of a chattel may reasonably be thought to be the owner when he offers it for sale, the case of a person in possession of a motor car does not differ in kind, although the absence of the registration book detracts from the signification of possession.

H While *Morris LJ* at pp 920–921 of the report in the same case had this to say in regard to the registration book of the car:

> It is clear that the person who is registered with the council as the 'owner' of a car is not necessarily the legal owner — though he may be. The 'owner' is the person by whom the vehicle is kept and used. Accordingly the register which is kept by councils does not purport to be a register which records the I names of the legal owners of cars: the councils will not know who are the legal owners. In conformity with all this, a notice in clear print appears on registration books as follows:

'Important. The person in whose name a vehicle is registered may or may not be the legal owner of the vehicle.' A

Regulations provide (see SI 1955 No 1664, reg 9) for what is to happen on a transfer of the vehicle. The registration book must be handed to 'the transferee or other new owner'. The old 'owner' must at once notify the appropriate council giving certain prescribed particulars. The new 'owner' or transferee must at once notify the council giving certain prescribed particulars and if he B intends to use the vehicle on roads repairable at the public expense he must before using it insert his name and address in the registration book and deliver it to the council. He may have had the licence transferred to him but otherwise must obtain one. If a current licence is transferred and then expires, the transferee or new 'owner', if he intends to renew the licence, must apply. There are special provisions if these can be used by a transferee under a trade C licence.

The result, as it seems to me, is that it cannot be assumed that the person in possession of a car and its registration book is the owner of the car. The absence of a registration book when a car is being sold will naturally give rise to much inquiry. The existence of one in the hands of a seller does not remove all occasion for inquiry and does not prove legal ownership. When the D plaintiffs reposed confidence in Cullis and gave him possession of their car with its book, they did not make a representation to those who had any dealings with Cullis that Cullis owned the car.

When the man calling himself Mr Ashley presented himself to the third parties in Birkenhead, those who dealt with him were deluded into believing that he was Mr Ashley. The man, for all they knew, might have been E Mr Ashley or he might not. Though the car was not on hire-purchase, Mr Ashley, the registered person, might not have been the legal owner at all. The man who went to the garage might have been someone who had been given possession of the car and book without being entitled to part with them. The man might have been merely a thief of the car and book.

In my judgment the Birkenhead purchasers, the third parties, who acted F with a measure of speed that was doubtless brought about by their induced belief in the respectability of the man they saw cannot acquire more than that man was able to pass to them. They may have acted as others might have done in the circumstances, but they took a risk. Because they were deceived by a confidence trickster, they did not think that they were taking a risk. If the plaintiffs had merely given Cullis the car, it is not suggested that there would G have been a representation to all the world that the possessor of the car was its legal owner; nor can such a representation be established because possession was also given of a book which does not prove legal ownership and which proclaims a clear warning and intimation that it does not.

Both Hosdon and Morris LJJ formed the majority decision for the case of H *Central Newbury Car Auctions Ltd v Unity Finance Ltd & Anor (Mercury Motors Third Parties)* with Denning LJ giving a strong dissenting judgment thereto. Be that as it may, it is germane to note that Morris LJ did remark that 'the absence of a registration book when a car is being sold will naturally give rise to much inquiry'.

It would not be out of place, at this juncture, to refer to the relevant I provisions of the Road Transport Act 1987 (Act 333) ('the RTA'). Section 7(1) of the RTA enacts that (no person shall possess or use a motor

A vehicle unless that vehicle is registered in accordance with this Part.) A licensed registrar shall keep the register and this is set out in s 8 of the RTA which enacts as follows:

> 8 (1) A licensed registrar assigned to a registration area shall keep and maintain a register of all motor vehicles registered under this Act in the registration area to which he is assigned.
>
> B
>
> (2) Such register shall be in such form and contain such information, details and particulars as the Director General may from time to time direct.

Section 10(1) of the RTA enacts that every application for the registration of a motor vehicle shall be made in the prescribed form to a licensed C registrar and shall be signed by the person for the time being entitled to the possession of the motor vehicle. Section 11(1) of the RTA then proceed to say that upon the registration of a motor vehicle, a licensed registrar shall:

> (a) ...
>
> D
>
> (b) register the person by whom the application for registration was made as the owner of the motor vehicle; and
>
> (c) issue to that person a registration certificate in the prescribed form.

and it clearly shows that upon the registration of the motor vehicle the person by whom the application for registration was made becomes under the law as the owner of the motor vehicle and holds a registration certificate E in the prescribed form so that he would be able to tell the whole world at large that he is the owner of the motor vehicle. The procedure when there is a change of ownership of the motor vehicle is amply set out in s 13 of the RTA and it is now reproduced hereinunder:

> (1) On any change of possession of a motor vehicle upon a voluntary transfer F made by the registered owner —
>
> (a) the registered owner shall, within seven days after such change of possession, forward to the licensed registrar a statement in the prescribed form, and shall deliver to the new possessor or the new owner the registration certificate relating to the motor vehicle and, unless he is surrendering the licence under s 19, the licence;
>
> G
>
> (b) the new possessor or new owner shall, within seven days after such change of possession, forward to such licensed registrar a statement in the prescribed form together with the registration certificate and the prescribed fee; and
>
> (c) the motor vehicle shall not be used for more than seven days after H such change of possession unless the new possessor or the new owner is registered as the owner thereof and, if the licence has been surrendered by the registered owner, it shall not be used until the new owner or new possessor has taken out a new licence:
>
> Provided that this subsection shall not apply in any case where the change of possession is consequent on a con-tract of hiring and the period does I not exceed one month.
>
> (2) On any change of possession of a motor vehicle otherwise than on a voluntary transfer made by the registered owner —

(a) the registered owner of the motor vehicle shall, within seven days after the change of possession, deliver the registration certificate relating to the motor vehicle to the person into whose possession the vehicle has passed, and shall, in writing, inform the licensed registrar of the change of possession;

(b) where the registration certificate is so delivered, the person into whose possession the motor vehicle has passed shall, within seven days after the change of possession, forward to the licensed registrar the registration certificate relating to the motor vehicle, and shall apply to such licensed registrar to be registered as the new owner in place of the registered owner;

(c) where a licensed registrar is satisfied that the registration certificate relating to the motor vehicle has not been delivered under para (a) to the person into whose possession the motor vehicle has passed, and that such person is entitled to the possession of the motor vehicle, the licensed registrar may, upon application made by such person and on payment of the prescribed fee, issue to such person a duplicate of the registration certificate; and

(d) the person into whose possession a motor vehicle has passed shall, upon making the prescribed application and upon payment of the prescribed fee and upon production to the licensed registrar of the registration certificate or a duplicate thereof, be entitled to be registered as the new owner of such motor vehicle.

(3) Upon the registration of a new owner of a motor vehicle, the licensed registrar shall make the necessary alterations in the register and in the registration certificate relating to such motor vehicle, and shall deliver the altered registration certificate to the new owner:

Provided that the licensed registrar may, if he considers it expedient so to do, issue in lieu of the altered registration certificate a new registration certificate.

There is no doubt that under the RTA, a current registered owner of a motor vehicle can dispose of his motor vehicle to the new possessor or the new owner with relative ease and inconvenience. Under the RTA, the registration of a motor vehicle gives the registrant the right to be the owner of the motor vehicle to the exclusion of all others. The word 'owner' is defined in s 2 of the RTA as follows:

(a) in relation to a motor vehicle registered or deemed to be registered under this Act, means the registered owner of such vehicle; and

(b) in relation to any other motor vehicle, means the person in possession of or using or having the use of the motor vehicle.

and in the context of the present case, since the Proton Wira motorcar JDL 3024 is registered under the RTA, para (a) to the definition of the word 'owner' must be the right paragraph to apply and that being the case the registered owner of the Proton Wira motorcar is none other than the defendant. Under s 2 of the RTA, 'registered owner' means the person registered as the owner of a motor vehicle under para (b) of sub-s (1) of s 11. By way of an analogy, reference to s 89(a) of the National Land Code 1965 should be made where it enacts that:

A

> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence —
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor;

and what better way to determine proprietorship of the land than by B referring to the register document of title. Likewise here, it is the best mode to determine the registered ownership of a motor vehicle by looking at its log book or registration card or the registration certificate in the prescribed form. Being the registered owner of the Proton Wira motorcar JDL 3024 the defendant carries with it some measure of liability. The defendant has to reckon with s 109(1) of the RTA which enacts that:

C

> For the purpose of any prosecution or proceedings under this Act, the registered owner of a motor vehicle shall be deemed to be the owner of that motor vehicle.

Here, I venture to say that the Proton Wira motorcar JDL 3024 was not on D hire purchase under the Hire-Purchase Act 1967 nor was it governed by the Contracts Act 1950 or the Sale of Goods Act 1957. The Proton Wira motorcar remains throughout a company car belonging to the defendant and the defendant remains till today as the registered owner on its log book or registration card or the registration certificate in the prescribed form. Unlike the case of *Ng Ngat Siang v Arab-Malaysian Finance Bhd & Anor*, E the log book or registration card or the registration certificate in the prescribed form as exhibited in exh 'DN12' of encl 13 in relation to the Proton Wira motorcar bears the following note in Bahasa Malaysia at para 6 thereof:

F

> Pemunya berdaftar kenderaan adalah bertanggungjawab di atas segala urusan berkaitan dengan kenderaan sehingga pertukaran milikan telah disempurnakan dan kenderaan telah didaftarkan dengan nama pemilik baru.

The plaintiff merely uses the Proton Wira motorcar JDL 3024 by virtue of his eligibility for its use under the defendant's offer of employment as seen in exh 'DN1' of encl 13 and that offer of employment do not give the G plaintiff any right to have the said motorcar to be transferred to the plaintiff's name after completion of two years' employment with the defendant. When the plaintiff abandoned his contract of employment on 8 October 1996, the eligibility to the use of the company car — the Proton Wira JDL 3024 ended and the motorcar must revert back to the defendant. The defendant at no time part with the log book nor the ownership of the H Proton Wira motorcar. Once the contract of employment terminates, the motorcar reverts back to the defendant. The log book or the registration card or the registration certificate in the prescribed form as an indicia of title or as an indicia of ownership is a very important piece of document. All the while the log book or the registration card or the registration certificate in the prescribed form is held by the defendant and the motorcar is maintained I by the defendant. If the log book or the registration card or the registration certificate in the prescribed form is not an important piece of document and the possession of it can never vest the defendant with the legal or beneficial

ownership of the Proton Wira motorcar, then why must the plaintiff seek a declaration that he is entitled as of right to the transfer of the said motorcar to him in his name and that the defendant be ordered to transfer the ownership of the said motorcar to the plaintiff?

This brings to mind the case of *Hilti Far East Pte Ltd v Tan Hup Guan* [1991] 3 MLJ 237. In that case the defendant was an employee of the plaintiffs. As a term of his employment he was entitled to a motorcar. The plaintiffs purchased a motorcar and registered it in the name of the defendant who signed a declaration of trust in favour of the plaintiffs. That declaration of trust was in these terms:

> ... I stand possessed of the said vehicle in trust for [the plaintiffs] ... I will sign and execute all documents and do all things which may be necessary to effectuate the transfer of the said vehicle to [the plaintiffs] or as it may direct.

The plaintiffs paid the initial registration fee, the insurance premium and the road tax and also the maintenance costs subsequently. The registration book of the said car was kept by the plaintiffs. The defendant was dismissed from employment on 2 October 1990 for 'insurbordination and misconduct'. When asked to return the motorcar, the defendant refused. On 5 October 1990, the plaintiffs wrote to the Registrar of Vehicles informing him of the ownership of the said car and requesting him not allow it to be transferred. The Registrar of Vehicles replied that he could not stop any application for transfer of vehicle ownership if the requisite documents were submitted. The plaintiffs then commenced this action for the following orders: a declaration that they were the beneficial owners of the said vehicle, an order restraining the defendant from using the said vehicle, damages, and an order for delivery up of the said vehicle to the plaintiffs. Chan Sek Keong J allowed the application. His Lordship was of the view that although the plaintiffs had claimed a declaration of trust, it was not a trust which gave them a right to possession of the said car. The said trust, in terms, did not oblige the defendant to deliver up possession of the said motorcar to the plaintiffs. It only obliged him to effect the transfer of the said car. The defendant did not own the car and the registration in his name did not make him the owner at law. His Lordship further proceeded to hold that the legal title to the said car passed to the plaintiffs when they bought it. They had given possession of the said car to the defendant and registered it in his name for a specific purpose, with no intention whatever of transferring legal or beneficial ownership thereof to the defendant. As owners, the plaintiffs were entitled to immediate possession of the said car upon the defendant ceasing employment with them. This was what his Lordship said in the body of the judgment (see pp 240–241 of the report):

> In the present case, although the plaintiffs had claimed a declaration of trust, it was not that trust which gave them a right to possession of the said car. The said trust, in terms, did not oblige the defendant to deliver possession of the said car to the plaintiffs. It only obliged him to effect the transfer of the said car, ie the registered ownership of the car. The defendant did not own the car and registration in his name did not make him the owner at law. As the Privy Council said in *Sajan Singh*'s case [1960] MLJ 52 at p 54:
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> > 'Their Lordships do not overlook the fact that the defendant remained registered as the owner of the lorry and that no permission was given for the sale: but this did not prevent the property in it passing to the plaintiff.

A The registration book is not in Malaya, any more than it is in England, a document of title. The title passed by the sale and delivery of the lorry to the plaintiff. The absence of registration would no doubt put the plaintiff in difficulty if he had to prove his title, but it would not invalidate it, see *Bishopsgate Motor Finance Corpn Ltd v Transport Brakes Ltd* at p 388.'

In that case, SA and SS came to an illegal arrangement whereby SA would buy B a lorry and register it in the name of SS as SA could not get a haulage permit to use the lorry for the carriage of goods whereas SS could and did. SA had possession of the lorry and used it as his own but in the name of SS. SA also paid all the operating expenses including road tax, insurance, petrol and also income tax on the profits of the operations. The parties fell out and SS took possession of the lorry. SA commenced an action for detinue and trespass. C The Privy Council held that he was entitled to succeed on both counts: in trespass, because he had actual possession of the lorry before it was taken by SS, and in detinue because the property in the lorry had passed to him even though the transaction was illegal.

In the present case, the legal title to the said car passed to the plaintiffs when they bought it. They had given possession of the said car to the D defendant and registered it in his name for a specific purpose, with no intention whatever of transferring legal or beneficial ownership thereof to the defendant. The said car was entered in its books as an asset of the company, as confirmed by their income tax returns. As owners, they were entitled to immediate possession of the said car upon the defendant ceasing employment with them. They were probably entitled to possession of the said car even if E the defendant had not ceased to be an employee, as the plaintiffs' contractual obligation was to provide a transport facility and not a specific motor car.

For the above reasons, I gave judgment in favour of the plaintiffs with costs.

Sajan Singh v Sardara Ali [1960] MLJ 52 (PC) was a case about an illegal F transaction of a motor lorry. The facts were sufficiently stated in the judgment of Lord Denning at pp 52–53 of the report, and I only need to refer to them:

Their Lordships can now turn to the facts of the case. The plaintiff Sardara Ali is a lorry driver. In 1948 he wanted to acquire a lorry and use it to carry goods on his own account. But he had no chance of getting a haulage permit G as he had never had one before the war. The defendant Sajan Singh was a haulier who had apparently had a haulage permit previously and had every chance of getting one. So they came to an arrangement whereby the defendant Sajan Singh was to acquire a second-hand lorry and to register it in his own name and to get a haulage permit for it in his own name, but all the time it was intended that it should belong to the plaintiff Sardara Ali and be used by him H on his own account. The transaction was carried out in this way: In December 1948, the British Military Disposals Board were offering six second-hand motor lorries for sale. The defendant Sajan Singh bought them in his own name but the plaintiff Sardara Ali paid $1,500 towards the cost on the understanding that one of them should belong to him. This vehicle was a Dodge lorry numbered M 2207. It was registered in the name of the defendant I Sajan Singh and the haulage permit was issued in his name. On 4 August 1950, the plaintiff Sardara Ali with a friend Nihal Singh paid another $3,500 and the defendant Sajan Singh gave the plaintiff Sardara Ali a document in the Punjabi language which, being translated, was as follows:

'I, Sajan Singh, (Malacca) have sold a Dodge lorry No M2207 to Nihal Singh and Sardara Ali jointly for $3,500. Both of them can sell this lorry

but cannot sell the haulage permit. The haulage permit is to be returned to Sajan Singh. If anyone asks for the lorry after my death he cannot get it. Even if (anyone) takes it by force then (he or she) must pay $3,500. If there is anything concerning the lorry then Nihal Singh and Sardara Ali can represent. Sajan Singh.'

In 1953, Nihal Singh sold his share in the lorry to the plaintiff Sardara Ali, who was thenceforward the sole person interested on the purchaser's side. He used the lorry as his own. He kept it at his own address, 132 Lorong Panjang, and used that address as his base of operations with it. He received the incomings, and according to his own story (which the trial judge in substance accepted) paid for the petrol and other outgoings. But as the lorry was registered in the name of the defendant, he did it all in the defendant's name. And as the defendant was liable for income tax, insurance, and so forth, the plaintiff delivered accounts to the defendant showing incomings and outgoings; and the plaintiff paid to the defendant the amounts due for insurance, taxes, and so forth. In short, the lorry belonged to the plaintiff but was operated in the name of the defendant.

All this method of operation was quite illegal. Although the plaintiff used the vehicle as his own, it was registered in the name of the defendant 'Sajan Singh, Bukit Asahan Estate, Malacca'. The haulage permit, too, was issued in the defendant's name. It was issued subject to the express condition that 'The permit holder shall use the vehicle from a base at Bukit Asahan Estate, Malacca': and to the condition that 'This permit is personal to the permit holder. It may not be trans-ferred or assigned': and to the further condition that 'the permit holder shall not suffer or permit any autorized vehicle to be driven by a person who is not a bona fide employee of the permit holder'. It was therefore quite illegal for the defendant to permit the plaintiff Sardara Ali to use it at all on his own account. The two of them were, as Smith J said, fellow conspirators engaged in practising a deceit on the public administration of the country. For aught that appears, both were equally guilty.

In 1954, the plaintiff and the defendant fell out. The defendant said that the lorry belonged to him and that the plaintiff was only a driver employed by him. The plaintiff said it was his, and he applied to the Commissioner of Road Transport for a haulage permit in his own name. His solicitors, on 29 December 1954, wrote to the Commissioner of Road Transport and said: 'What we are asking for is the removal of the present permit holder and the re-issue of the permit in our client's own name.' The defendant promptly took counter-measures. He seized the lorry. In the afternoon of 26 or 27 January 1955, whilst the plaintiff was absent from his home, the defendant came and took the lorry away. He has always since refused to return it, claiming that it belongs to him.

In June 1955, the Commissioner for Road Transport refused to grant a haulage permit to the plaintiff. The refusal was in some way connected with Government policy about the entry of Malays into the road transport industry. Undeterred by this refusal, the plaintiff continued to claim the lorry. In November 1955 he brought these proceedings against the defen-dant. In his Statement of Claim he relied on the document of sale of 4 August 1950, and set it out in full. He said he had paid the defendant $5,000. He further alleged that the vehicle was in his possession until 27 January 1955, when the defendant took it away and had since refused to return it. By his prayer he asked:

(i) for a declaration that the plain-tiff is the owner of the autorized vehicle;

(ii) for the return of the Dodge Motor lorry No M 2207 as an autorized vehicle, ie together with the use of the haulage permit;

A (iii) in the alternative damages for detinue $5,000;

(iv) damages at $400 per month for loss of earnings or profit from 27 January 1955.

The defendant in his defence claimed that the lorry belonged to him and that the plaintiff was employed by him as a driver. He denied having signed the B document of sale dated 4 August 1950.

Lord Denning focussed his attention to the facts of the case and concluded as follows (see p 54 of the report):

It is not, perhaps, strictly accurate to say that the action was laid in trespass. It was an action for a declaration coupled with a claim in detinue. In order to C get a declaration, it was essential for the plaintiff to show that he was the owner of the lorry and that it was an autorized vehicle. In order to succeed in detinue, it was essential for the plaintiff to show that he had the right to immediate possession of the lorry at the time of commencing the action, arising out of an absolute or special property in it, see *Bullen & Leake* (3rd Ed) p 312. And in detinue their Lordships think he succeeded. Although the transaction between D the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out: and on that account it was effective to pass the property in the lorry to the plaintiff. There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose — and one of them transfers property to the other in pursuance of the conspiracy — then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred E by the one to the other remains vested in the transferee, notwithstanding its illegal origin, see *Scarfe v Morgan* (1838) 4 M & W at p 281, per Parke B. The reason is because the trans-feror, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it — he cannot throw over the transfer. And the transferee, having got the property, can assert his title to it against all the world, not because he has any F merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality — it has no power to do so — so it says, in the words of Lord Eldon: 'Let the estate lie where it falls', see *Muckleston v Brown* (1801) 6 Ves Jnr at p 69. This principle was applied by the Court of Appeal recently in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at the top of p 70. The parties to the fraud are, G of course, liable to be punished for the part they played in the illegal transaction, but neverthe-less the property passes to the transferee.

Their Lordships do not overlook the fact that the defendant remained registered as the owner of the lorry and that no permission was given for the sale: but this did not prevent the property in it passing to the plain-tiff. The registration book is not in Malaya, any more than it is in England, a document H of title. The title passed by the sale and delivery of the lorry to the plaintiff. The absence of registration would no doubt put the plaintiff in difficulty if he had to prove his title, but it would not invalidate it, see *Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd* [1949] 1 KB 322 at p 338.

In this case, on the facts pleaded and the findings of the trial judge, the plaintiff had a clear cause of action. He had actual possession of the lorry at I the moment when the defendant seized it. Despite the illegality of the contract, the property had passed to him by the sale and delivery of the lorry, compare *Bowmakers Ltd v Barnet Instruments Ltd* referred to above. When he commenced this action, he had the right to immediate possession. Their Lordships think that in these circumstances he had a claim in detinue. But he had also, as the Court of Appeal has found, a clear claim in trespass. Trespass

was not in terms pleaded, but the facts were pleaded. And on the facts the plaintiff was entitled to rely on his possession. The Court of Appeal did not actually direct amendment of the pleadings, but it is clear from their judgment that, had they been asked to do so, they could have done so. Their Lordships think that, on the facts pleaded, they were fully justified in reversing the decision of the trial judge.

The plaintiff would have been entitled to an order for the return of the vehicle or its value. As it had not been returned, he was clearly entitled to its value. That is the order made by the Court of Appeal and their Lordships agree with it.

Their Lordships would only add this: if the law were not to allow the plaintiff to recover in this case, it would leave the defendant in possession of both the lorry and the money he received for it. Their Lordships are glad to have been able to reach the conclusion that, on the facts of the present case, this is not the law.

Their Lordships will therefore report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed.

Appeal dismissed.

Another interesting case worth referring to is the case of *Soon Teck Finance (M) Bhd v Public Finance Bhd* [1988] 3 MLJ 417. There the plaintiff entered into a hire-purchase agreement with Chong Chan Fatt for the hiring of a vehicle bearing Registration No AV 3366. The vehicle was then registered with the Registrar and Inspector of Motor Vehicles, Penang in the name of Chong Chan Fatt but with the ownership claimed by the plaintiff. Chong Chan Fatt never paid the instalments due and the plaintiff terminated the agreement. In the course of repossession inquiries, the plaintiff discovered that the Registration No AV 3366 had been changed to PY 4598 and the indorsement of 'ownership claimed' had been cancelled and replaced by the defendant company. The plaintiff sought, inter alia, a declaration that the vehicle is the property of the plaintiff. During the trial, the defendant called three witnesses to testify that the hire purchase transactions in respect of vehicle Registration No PY 4598 was proper and legal and in accordance with normal business transactions. It was common ground that the only issue in this case was who has a better title to the vehicle. In dismissing the plaintiff's claim, Mohamed Dzaiddin J (now FCJ) was of the view that on the face of all available documents, in particular the vehicle registration card, the defendant was said to be prima facie the legal owner as he was the registered owner under the 'ownership claimed' of the vehicle bearing Registration Number PY 4598. His Lordship further held that since the plaintiff was disputing the defendant's title to the vehicle, the onus was on the plaintiff to show that the defendant had acquired the title of the vehicle illegally or without proper inquiry or that he was not a purchaser in good faith. His Lordship also held that the plaintiff had failed to adduce any evidence to show that he had a better title to the vehicle. The defendant company was a purchaser in good faith of the vehicle without notice of any defect in the seller's title. The defendant had also made adequate inquiries in the ordinary course of business to determine that the vehicle was free from any defect as to its title.

Factually speaking, in the present case, the scenario was unlike that of *Sajan Singh*'s case. There was not an iota of evidence to show that there was an illegal transaction between the plaintiff and the defendant in the present

A case. The transaction, if it can be called one, was merely one under a contract of employment where the plaintiff was eligible to use the company car while he was still in the employment of the defendant. The Proton Wira motorcar was, unlike that of *Hilti Far East Pte Ltd v Tan Hup Guan*, registered in the name of the defendant and till today it is still registered in the name of the defendant and the log book or the registration card or the B registration certificate in the prescribed form remains till today in the possession of the defendant. As I said, the present case did not fall under the category of a hire-purchase agreement and neither was it a sale of the Proton Wira motorcar to the plaintiff. Every case must be decided on its own facts. As an indicia of title, the log book or the registration card or the C registration certificate in the prescribed form in the name of the defendant and in the possession of the defendant makes the defendant in a better position than that of the plaintiff. Prima facie the defendant is the legal owner and has a better title to the Proton Wira motorcar than the plaintiff. There are no two ways about it.

D The plaintiff argued that there was a bailment and a lien in regard to the Proton Wira motorcar but these averments were not supported by nor reflected in the Statement of Claim. A party is bound by his pleadings and his case is confined to the issues raised on the pleadings. In *Burns v Dixon's Iron Works Ltd* [1961] SC 102, Lord Justice Clarke Thompson aptly said:

> E The court is often charitable to records and is slow to overturn verdicts on technical grounds. But when a pursuer fails completely to substantiate the only ground of fault averred, and seeks to justify his verdict on a ground which is not just variation, modification or development of what is averred but is something which is new, separate and distinct, we are not in the realms of technicality.

F Mathew CJ in *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 remarked as follows:

> Nowhere in the pleadings is it alleged that the agreement was in the nature of a document of loan, and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial judge had no alternative but to order specific performance of the G agreement or to award damages. I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record, which in this case they were not, *Blay v Pollard & Morris* [1930] 1 KB 628 (at p 634). It is a cardinal principle of law that a judge is bound to decide a case strictly on the issues on the record, and in so deciding the case before him the judge has only to decide on the issues H pleaded by the parties and no more. Lord Diplock puts it rather well in the case of *Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191 at p 233:
>
> > 'Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural I justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is.'

That being the case, I will not dwell on the issues of bailment and lien in this judgment.

In my judgment, this case is an exceptional and extremely rare case with a high degree of assurance that the injunction sought will be granted at the conclusion of the trial. This court certainly has the power at its disposal to grant an interlocutory mandatory injunction notwithstanding the fact that it would give the defendant the whole remedy as prayed for in the counterclaim. This was my judgment and I so hold accordingly.

Having considered all the circumstances of this case particularly the necessity to give adequate protection and safeguards to both sides, I made the following orders and directions:

(1) that the Proton Wira motorcar JDL 3024 should be kept at the premises of the High Court Johor Bahru and this order must be complied with at or before 22 June 1998. The key to the said motorcar and the road tax to be handed to the senior assistant registrar ('the SAR').

(2) there being no order as to costs.

(3) the hearing date to be expedited.

It follows therefore, and it was judgment that:

(1) the plaintiff had no right in law or in equity to detain the defendant's motorcar Proton Wira JDL 3024 as it is the property of the defendant;

(2) the plaintiff had no basis whatsoever be it in law or fact to claim the beneficial ownership of the said motorcar;

(3) the defendant under the RTA is the registered owner of the said motorcar;

(4) the log book or the registration card or the registration certificate in the prescribed form is the indicia of ownership or the indicia of title of the said motorcar as the said motorcar is registered under the relevant provisions of the RTA;

(5) the defendant had succeeded in establishing a good arguable claim to the right it sought to protect;

(6) that the delay by the defendant in filing encl 15 was not fatal and had been properly explained, accounted for and accepted by this court;

(7) the hearing of encl 15 was of great urgency and was properly brought before this court; and

(8) this was an exceptional and rare case for the granting of the interlocutory mandatory injunction.

In the course of writing this judgment, I was told by Mr Che Mohamed Zulkifly bin Jusoh, the hardworking and reliable SAR, that the Proton Wira motorcar JDL 3024 that was kept in the premises of the High Court Johor Bahru in pursuance to the direction of this court had gone missing. My SAR forthwith lodged a police report on 3 July 1998 at 4pm. and his report is now reproduced hereinunder:

> Pada 15 Jun 1998, YA Dato' Hj Abdul Malik bin Hj Ishak, Hakim Mahkamah Tinggi Johor Bahru telah membuat satu perintah dalam kes Guaman Sivil 22-35-97 bahawa plaintif menyimpan kenderaan Proton Wira JDL 3024 di premis Mahkamah Tinggi Johor Bahru pada atau sebelum 22 Jun 1998. Juga di perintahkan plaintif menyerahkan kunci kenderaan JDL 3024 tersebut

A berserta 'disc' cukai jalan kenderaan JDL 3024 tersebut kepada Penolong Kanan Pendaftar, Mahkamah Tinggi Johor Bahru pada atau sebelum 22 Jun 1998. Pada 29 Jun 1998, peguam plaintif En Zahar bin Ngah datang ke Mahkamah menyerahkan kenderaan Proton Wira JDL 3024, satu kunci dan 'disc' cukai jalan kenderaan tersebut kepada saya disaksikan oleh kerani saya En Md Zain bin Hj Nordin dan Puan Kalaimalar, Jurubahasa Tamil, B Mahkamah Tinggi Johor Bahru. Peguam En Zahar Ngah datang ke mahkamah bersama seorang lelaki Melayu. Kenderaan tersebut disimpan di dalam kawasan premis Mahkamah Tinggi Johor Bahru dalam keadaan berkunci. Kunci kenderaan tersebut berserta 'disc' cukai jalan disimpan dalam peti besi pejabat saya dimana kunci peti besi tersebut disimpan oleh Ketua Kerani Puan Azizah bte Abd Jamal. Pada 3 Julai 1998, lebih pukul 2 petang semasa saya masuk ke kawasan mahkamah dari masjid, saya dapati C kenderaan tersebut telah tiada ditempat ianya disimpan. Saya telah mencarinya di sekitar mahkamah tapi gagal ditemui. Laporan dibuat untuk tindakan oleh pihak polis.

It is now apparent that the order of this court to keep the Proton Wira motorcar JDL 3024 at the premises of the High Court, Johor Bahru was an D impotent and a sterile decree. As A Conan Doyle said in the *Adventure of the Speckled Band*:

> It's a wicked world, and when a clever man turns his brains to crime, it is the worst of all.

A theft took place in the premises of the High Court, Johor Bahru. It would E be unthinkable that the Proton Wira JDL 3024 could simply disappear from the compound of the High Court, Johor Bahru — the pinnacle of justice. Once the Proton Wira JDL 3024 left the court compound, it was gone beyond trace. Who was the culprit? That would be anyone's guess. The police must solve the riddle and bring to book the culprit or culprits to the F altar of justice.

Section 378 of the Penal Code enacts that:

> whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

G Thus, in essence theft is committed by:

(1) moving a moveable property of a person out of his possession without his consent; and

(2) the moving being in order to the taking of the moveable property with a dishonest intention.

H

To establish a case of theft, it is necessary for the prosecution to establish that certain moveable property was taken out of the possession of a person without his consent and that for the purpose of such taking the moveable property was moved. Another important ingredient would be that the accused had the intention to take the moveable property dishonestly. It is I incumbent on the prosecution to prove dishonest intention by direct or indirect evidence. Dishonesty in criminal law has a technical meaning. Section 24 of the Penal Code defines 'dishonestly' as:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether

> the act causes actual wrongful loss or gain, is said to do that thing 'dishonestly'.
>
> Explanation — In relation to the offence of criminal misappropriation or criminal breach of trust it is immaterial whether there was an intention to defraud or to deceive any person.

and it is clear therefore that a person is said to do a thing dishonestly if he did it with the intention of causing wrongful gain to himself or wrongful loss to another person. It is not necessary for the prosecution to prove both wrongful gain to the accused and wrongful loss to the owner. In my considered view, it is sufficient — nay it would be enough, if the prosecution proves either of the two. To commit theft, the culprit need not take moveable property permanently out of the possession of another with the intention not to return it to him. It would be sufficient if the culprit takes any moveable property out of the possession of another person even though he intends to return it later on. It makes not a whit of a difference to the culprit's guilt if the act was not intended to procure any personal benefit to himself.

Storr J in *Ward & Anor v Public Prosecutor* [1953] MLJ 153 at p 154 had this to say of s 378 of the Penal Code:

> Section 378 of the Penal Code defines the offence of theft as:
>
> > 'Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.'
>
> and in that section the word 'dishonestly' does not take its usual dictionary meaning but has a separate definition in s 24 of the Code. That section reads:
>
> > 'Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly.'
>
> and 'wrongful gain' and 'wrongful loss' mentioned in s 24 are further defined in s 23 of the Code, so that as was stated by Petheram C.J, in a judgment of the full bench in *Queen-Empress (on the prosecution of Kunjo Pramanick) v Sri Churn Chungo* ILR 22 Cal 1021, s 378, after taking into consideration ss 24 and 23, will read as follows:
>
> > 'Whoever in order to take with the intention of gaining property by unlawful means moves that property, or whoever in order to take with the intention of retaining by unlawful means property which he does not intend to acquire, moves that property, or whoever moves property in order to take it with the intention of keeping the person entitled to the possession of it out of the possession of it by unlawful means, though he does not intend to deprivehim permanently of it, is said to commit theft. When the section is read in this way it is evident that it was the intention of the legislature that it should be theft under the Code, to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them,or to entirely deprive the owner of them.'
>
> which, I think, gives a true and fuller definition of the offence defined in s 378.

PP v Toh Kee Huat [1965] 1 MLJ 76 was a case of theft of a motor car. There the respondent was acquitted at the close of the prosecution's case on a charge under s 379 of the Penal Code for the theft of a motor car

despite the discovery of the respondent's finger prints on the inner surface of the glass pane of the motor car. Ong J remitted back the case to the trial court for the respondent's defence to be called since his Lordship correctly held that the weight of the evidence of the finger prints can never be decried.

The prosecution too can rely on circumstantial evidence to bring the culprit or culprits to justice. Indeed circumstantial evidence when led can give rise to the conviction of the culprit or culprits. The headnote to the case of *Idris v PP* [1960] MLJ 296 merits reproduction. There it was stated that:

> Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. In this case the circumstantial evidence pointed conclusively to the accused's guilt.

That was a case where the prosecution relied entirely on circumstantial evidence to bring the appellant to justice. Hill Ag CJ at p 297 of the report aptly said:

> If the pertinent prosecution witnesses were believed, and the jury must have believed them, there was a series of circumstances and coincidences which in our opinion when considered in the aggregate pointed conclusively to the accused's guilt.

Pike CJ (Borneo) in *Chang Kim Siong v PP* [1968] 1 MLJ 36 sounded a warning, worth noting. This was what his Lordship said:

> ... The onus on the prosecution when the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistably to the conclusion of the guilt of the accused.

Sunny Ang v PP [1966] 2 MLJ 195 (FC) was a case where the prosecution successfully relied on circumstantial evidence and brought home a conviction against the appellant. The victim's body was never found but the court held that there was overwhelming evidence on the record to show that the appellant murdered the victim. At p 198 of the report, Tan Ah Tah Ag. CJ of Singapore delivering the judgment of the Federal Court said:

> It was also contended that the learned trial judge erred in law in failing adequately to direct the jury on the danger of convicting an accused person upon circumstantial evidence. There are two passages in the summing-up which are relevant in this connection. The first passage, which comes after the direction in which the learned trial judge deals with what he refers to as the first question of the cumulative effect of circumstantial evidence, is as follows:
>
> > 'The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — 'Was it an accident'
>
> The second passage is as follows:
>
> > 'Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is:

where does the totality of them, the total effect of them, all lead you to? Adding them together, considering them, not merely each one in itself, but altogether, does it or does it not lead you to the irresis-tible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts?

The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one conclusion only: that it was the accused who intentionally caused the death of this young girl.'

In our opinion, these directions are perfectly adequate in a case where the prosecution are relying on circumstantial evidence.

These are but mere observations to show what the prosecution could do and able to do to garner a conviction. The punishment of theft of a motor vehicle is amply set out in s 379A of the Penal Code as follows:

379A(1) Whoever commits theft of a motor vehicle or any component part of a motor vehicle shall be punished with imprisonment for a term of not less than one year and not more than seven years, and shall also be liable to fine.

(2) In this section —

'component part', in relation to a motor vehicle, includes any tyre, accessory or equipment;

'motor vehicle' means a mechanically propelled vehicle intended or adapted for use on roads, and includes a trailer drawn by a motor vehicle.

It is disheartening to note that the Proton Wira motorcar JDL 3024 can simply disappear from the compound of the High Court, Johor Bahru. But, in the long run, justice will prevail. No one can escape the long arm of the law. He who runs foul of the law, must make his peace in a court of law.

Order accordingly.

Reported by Jafisah Jaafar